Supreme Court, U.S.
FILED

00-357 AUG 31 2000

No. OFFICE OF THE CLERK

In The

# Supreme Court of the United States

JOHN L. REYNOLDS,

*Petitioner,*

*vs.*

PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

**On Petition For Writ Of Certiorari To The New York State Court Of Appeals**

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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256pp

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STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. CARMEN BEAUCHAMP CIPARICK,
Associate Judge

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

JOHN L. REYNOLDS,

Appellant.

**CERTIFICATE DENYING LEAVE**

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I, CARMEN BEAUCHAMP CIPARICK, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission is hereby denied. Stay request dismissed as academic.

Dated: June 2, 2000
at New York, New York

/s/
Associate Judge

* ***Description of Order:*** Order of the Appellate Division, Fourth Judicial Department, entered February 16, 2000, affirming a judgment of the County Court, Cattaraugus County, entered January 29, 1999.

**SUPREME COURT OF THE STATE OF NEW YORK**
***Appellate Division, Fourth Judicial Department***

**1738**

PRESENT: PINE, J.P., WISNER, HURLBUTT AN BALIO, JJ.

---

KA 99-535

PEOPLE OF THE STATE OF NEW YORK,
PLAINTIFF-RESPONDENT,

V

JOHN L. REYNOLDS, DEFENDANT-APPELLANT.

---

John L. Reynolds having appealed to this Court from the judgment of the Cattaraugus County Court, entered in the Cattaraugus County Clerk's Office on January 29, 1999, and said appeal having been argued by Paul J. Cambria, Jr., of counsel for defendant-appellant, Diane M. LaVallee of counsel or plaintiff-respondent, and due deliberation having been had thereon,

It is hereby ORDERED that the judgment so appealed from be and the same hereby is unanimously affirmed, and the matter is remitted to Cattaraugus County Court for proceedings pursuant to CPL 460.50(5).

Memorandum that is hereby made a part hereof.

Entered: February 16, 2000 CARL M. DARNALL, Clerk

SUPREME COURT OF THE STATE OF NEW YORK
*Appellate Division, Fourth Judicial Department*

**(1738) KA 99-535 (Cattaraugus Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JOHN L. REYNOLDS, DEFENDANT-APPELLANT.** -- Judgment unanimously affirmed. Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the second degree (Penal Law §125.15[1]) and sentencing him to an indeterminate term of imprisonment of 4 to 12 years. Defendant's appeal bring sup for review the denial of defendant's motion to set aside the verdict pursuant to CPL article 330. On appeal, defendant contends that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence; that County Court erred in failing to charge the jury concerning the definition of circumstantial evidence and the "moral certainty" standard; that the court violated CPL 270.35 and otherwise erred in discharging a sworn juror without conducting a probing inquiry and, in so doing, deprived defendant of his right to be present at a critical stage of trial; that the court erred in refusing to recuse itself from defendant's CPL 330.30 motion; that the verdict should be set aside on the ground of juror misconduct; and that the sentence is unduly harsh or severe.

The conviction is supported by legally sufficient evidence (*see, People v. Williams*, 84 NY2d 925, 926), and the verdict is not against the weight of the evidence (*see, People v. Bleakley*, 69 NY2d 490, 495). The People were required to prove that defendant recklessly caused the death of the victim (*see*, Penal Law §125.15[1]), i.e., that defendant was aware of and consciously disregarded a substantial and unjustifiable risk of death (*see*, Penal Law §15.05[3]; *see generally, People v. Johnson*, 199 AD2d 418, *lv denied* 83 NY2d 854). Although no one could specifically identify defendant as one of the individuals who attacked the victim, defendant fit the description of one of those attackers as a dark-haired man wearing a dark shirt. Moreover,

the testimony of various witnessed placed defendant in proximity to the victim throughout the attack and established that no one if that vicinity abstained from the attack. Further, defendant fled the scene upon the arrival of police, showing his consciousness of guilt. Under the circumstances, the testimony and the logical inferences to be drawn therefrom support a finding that defendant punched and kicked the victim and thus recklessly caused his death (*see, People v. Peck*, 192 AD2d 746, 747; *People v. Quinones*, 177 AD2d 519, 520, *lv denied* 79 NY2d 862; *cf., People v. Bridenbaker*, __ AD2d __ [decided Nov. 12, 1999]; *People v. Figueroa*, 143 AD2d 767, *lv denied* 73 NY2d 855; *People v. Osburn*, 124 AD2d 1048, 1049, *lv denied* 69 NY2d 748, 831).

In any event, defendant was charged both as a principal and as an accomplice. Penal Law §20.00 provides, "When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct." Here, the evidence is sufficient to show that defendant requested, solicited, commanded or importuned the acts leading to the victim's death, and that he led the pursuit of the victim and his companions. To be weighed against that evidence was defendant's denial of involvement and the attempts by defendant to depict himself as a peacemaker throughout the exchange of insults and epithets that preceded the melee. Weighing that evidence, we conclude that the jury did not fail to give the evidence the weight it should have been accorded on the issue of defendant's culpability as a principal or an accomplice.

Defendant's contention that the court erred in failing to define circumstantial evidence in its charge to the jury is unpreserved for our review (*see*, CPL 470.05[2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see*, CPL 470.15[6][a]). There is no merit to defendant's contention that the court erred in

refusing to charge the "moral certainty" test for evaluating circumstantial evidence. Evidence of defendant's guilt was not purely circumstantial (*see, People v. Daddona*, 81 NY2d 90, 992; *People v. Barnes*, 50 NY2d 375, 379-380). With respect to defendant's complicity, there was direct evidence (*see, People v. Daddona, supra*, at 992) establishing that defendant urged his accomplices to assault the three men (*see, People v. Roldan*, 88 NY2d 826, 827; *People v. Blount*, __ AD2d __ [decided Oct. 21, 1999]). A moral certainty instructions is not required merely because the proof with respect to any particular element -- here, intent -- is wholly circumstantial (*see, People v. Johnson*, 65 NY2d 556, 561, *rearg denied* 66 NY2d 759; *People v. Miller*, 255 AD2d 460, *lv denied* __ AD2d __ [decided Nov. 30, 1999]).

We reject defendant's contention that reversal is required based on the court's alleged violation of CPL 270.35 in discharging a sworn juror for cause. Defense counsel demanded that the juror be discharged (*see, People v Joy*, 206 AD2d 440, *lv denied* 84 NY2d 869) and did not ask that the juror be questioned directly. There is no basis for defendant now to complain about the court's handling of that matter (*cf., People v. Torres*, 80 NY2d 944, 945, *rearg denied* 81 NY2d 784; *People v. Santiago*, 255 AD2d 63, 67-69, *lv denied* __ NY2d __ [decided Nov. 30, 1999]).

Nor did the court violate defendant's right to be present at a critical stage of trial. A conference leading to the court's discharge of a sworn juror is not a critical stage of trial at which a defendant must be present (*see, People v. Aguilera*, 82 NY2d 23, 34; *People v. Torres, supra*, at 945). In any event, defendant was present during the entire conference leading to that determination, although not present when the court informed the juror of his discharge.

There was no error in the refusal of the court to recuse itself from defendant's CPL 330.30 motion because there was no valid basis for doing so (*see generally, People v. Moreno*, 70 NY2d 403, 405-407). The evidence at the hearing established that

the jurors were not subjected to any improper outside influence (*see*, CPL 330.30[2]; *People v. Leonard*, 252 AD2d 740, 741, *lv denied* 92 NY2d 983; *People v. Gonzales*, 228 AD2d 722, *lv denied* 88 NY2d 1021). We have considered defendant's challenge to the severity of the sentence and conclude that it is without merit. (Appeal from Judgment of Cattaraugus County Court, Himelein, J. - Manslaughter, 2nd Degree.) PRESENT: PINE, J.P., WISNER, HURLBUTT AND BALIO, JJ. (Filed Feb. 16, 2000.)

STATE OF NEW YORK
COUNTY OF CATTARAUGUS : COUNTY COURT

---

THE PEOPLE OF THE STATE OF NEW YORK

| VS | | CERTIFICATE OF |
|---|---|---|
| JOHN L. REYNOLDS | Defendant | CONVICTION |
| DOB: 9/14/72 | | IND 95-168 |

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This is to certify that JOHN L. REYNOLDS was charged with MURDER 2nd, Sec. 125.25(2), MANSLAUGHTER 1st, Sec. 125.20(1), MANSLAUGHTER 2nd, Sec. 125.15(1), ASSAULT 1st, Sec. 120.10(1) and ASSAULT 2nd, Sec. 120.05(2) on December 1, 1995 under Indictment 95-168. On September 8, 1997, the Court dismissed Count 22 - Manslaughter 1st, Sec. 125.20(1) and Count 24 - Assault 1st, Sec. 120.10(1) on the People's Motion. On September 17, 1997, after a Jury Trial was conducted, the defendant was found Guilty of MANSLAUGHTER 2nd, Sec. 125.15(1) and was hereby sentenced to an indeterminate term of incarceration in the New York State Corrections System having a maximum period of Twelve (12) Years and a minimum period of Four (4) Years. A $155.00 Mandatory Surcharge was imposed by the Honorable Larry M. Himelein on the 29th day of January, 1999.

Dated: July 28, 1999

/s/
Sandra A. Wogick
Chief Clerk

S E A L

To be Argued by:
Paul J. Cambria, Jr., Esq.
Estimated Time for Argument:
20 Minutes

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STATE OF NEW YORK
SUPREME COURT
APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

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PEOPLE OF THE STATE OF NEW YORK,

*Plaintiff/Respondent,*

vs.

JOHN L. REYNOLDS,

*Defendant/Appellant.*

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Cattaraugus County Indictment No. 95-168

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# BRIEF FOR APPELLANT

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## QUESTIONS PRESENTED

1. Does the trial court's refusal to instruct the jury on the moral certainty standard in a wholly circumstantial case and its failure to provide even the most minimal definition of circumstantial evidence require reversal of appellant's conviction and the granting of a new trial?

   *Answer below: Cattaraugus County Court denied appellant's motion to set aside the verdict on this ground.*

2. Does the trial court's violation of CPL §270.35 and its denial of appellant's state and federal constitutional to be present at all critical stages of the trial require reversal of appellant's conviction and the granting of a new trial?

   *Answer below: None.*

3. Did the trial court err in refusing to recuse itself from appellant's CPL §330.30 motion hearing?

   *Answer below: Appellant's motion for recusal was denied.*

4. Did juror misconduct during deliberations violate appellant's constitutional rights to a fair trial?

   *Answer below: The trial court denied appellant's CPL §330.30 motion on this ground.*

5. Is the sentence imposed on appellant harsh and excessive?

   *Answer below: None.*

6. Is appellant's conviction supported by legally sufficient evidence? Is appellant's conviction against the weight of the evidence?

*Answer below: The trial court denied appellant's CPL §330.30 motion with respect to the illegal sufficiency of the evidence supporting the jury's verdict.*

## PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction before Honorable Larry M. Himelein (Cattaraugus County Court).

Under Cattaraugus County Indictment No. 95-168, appellant, along with seven other co-defendants, was charged with Murder in the Second Degree [Penal Law §125.25(a)], Manslaughter in the First Degree [Penal Law §125.20(1)], Manslaughter in the Second Degree [Penal Law §125.15(1)], Assault in the First Degree [Penal Law §120.10(1)] and Assault in the Second Degree [Penal Law §120.25(2)]. All of appellant's co-defendants took pleas, resulting in the following dispositions:

(1) Sandra S. Haggerty - pled guilty to assault in the third degree and was sentenced to sixty (60) days in the Cattaraugus County jail and three (3) years probation.

(2) Kerrie L. Haggerty - pled guilty to assault in the third degree and was sentenced to one (1) year in the Cattaraugus County jail.

(3) Brian E. Mooney - pled guilty to criminally negligent homicide and was sentenced to one year in the Cattaraugus County jail.

(4) Shane Appleby - pled guilty to criminally negligent homicide and was sentenced to an indeterminate term of incarceration of from

one and one-third years to a maximum of four (4) years.

(5) Shawn Appleby - pled guilty to manslaughter in the second degree and was sentenced to an indeterminate term of incarceration of from two and one-third years to a maximum of seven years.

(6) Cory Shea - pled guilty to criminally negligent homicide and was sentenced to one (1) year in the Cattaraugus County jail.

(7) Troy A. Fusco - pled guilty to assault in the third degree and was sentenced to sixty (60) days in the Cattaraugus County jail and three (3) years probation.

John Reynolds, the appellant in the instant case and the only defendant who chose to exercise his right to a trial, received a disproportionately high sentence.

Appellant was tried for the following offenses: murder in the second degree, manslaughter in the second degree, criminally negligent homicide and assault. Trial of this action commenced with jury selection on September 8, 1997. Presentation of proof began September 10, 1997 and the jury rendered a verdict on September 17, 1997. The jury found appellant guilty of Manslaughter in the Second Degree and acquitted him of Murder in the Second Degree, Assault in the Second Degree and Assault in the Third Degree.

On January 29, 1999, appellant was sentenced to an indeterminate period of incarceration of from four to twelve years. A timely Notice of Appeal was filed on January 29, 1999.

Appellant is represented on this appeal by Paul J. Cambria, Jr., Esq., Roger W. Wilcox, Jr., Esq. and Shannon M. Heneghan, Esq., of the law firm Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP. The People of the State of New York have been represented throughout these proceedings by the New York State Attorney General's Office.

## STATEMENT OF FACTS

The People presented eighteen witnesses at trial. Eleven of these witnesses observed events at the East Side Pizzeria in Olean, New York, on October 22, 1994. Not a single one of these individuals witnessed any physical involvement of John Reynolds in the altercation involving Kevin King. The proof set before the jury was entirely circumstantial, without a shred of direct evidence establishing John Reynolds' culpability for the death of Kevin King.

The main elements of the chronology of this incident concern events both inside the East Side Pizzeria and outside the pizzeria (where the altercation at issue occurred). This factual summary will address the relevant testimony in a similar manner.

### I. Events Inside The Pizzeria

The significance of the events inside the pizzeria derives primarily from the prosecution's trial strategy of attempting to cast John Reynolds as the group leader who exhorted his friends to violence and "led the charge" on Kevin King and his friends. However, examined closely, the facts do not support this tactical characterization of appellant and, in fact, show that he actively tried to resolve the differences between his friends and the King group (which included his sister's brother-in-law, Steven Hellwig).

The first prosecution witness, Dale Cummings, stopped at the East Side Pizzeria with his wife Kathy after playing a "gig" with

his band in Wellsville, New York. They arrived at the restaurant at approximately 2:15 a.m. and saw Gayle Wheeler waitressing and Ray Seeley working as the cook [765-66]. Around 2:30 a.m., a large group of kids entered the pizzeria. The group was comprised of approximately ten individuals (both male and female). They sat at two tables near the middle of the front window of the restaurant. Cummings thought that the group was loud and obnoxious [878-81]. He recognized Kerrie Haggerty and did not know who the others were by name, but recognized some of the kids [876].

At about 2:35 a.m., Kevin King, Steven Hellwig and Kevin Kenyon entered the restaurant. Kenyon had a black eye when he greeted Kerrie Haggerty. Cummings observed another individual (not identified as either male or female) look at Kenyon and say, "boy, the more they come in, the uglier they fuckin' look." He recalled that there was a small pushing or shoving match between Kenyon and one of the seven males sitting at the table. Based upon his observations, Cummings thought Kenyon was intoxicated given his slow actions and the fact that he burst with anger when the comment about his eye was made. Cummings did not feel that Kevin King and Stephen Hellwig were intoxicated [881-86].

Kevin Kenyon then very angrily left the restaurant and stood outside the front window, gesturing to the large group inside. King and Hellwig remained in the restaurant. According to Cummings, at some unspecified point in time, Ray Seeley asked Kenyon, Hellwig and King to come outside, but Cummings could not hear what was said. Eventually Kenyon reentered the restaurant after failing in his efforts to get the larger group to pursue him outside, and sat at the counter with King and Hellwig [884-85, 891].

While at the counter, Kevin Kenyon continued to make eye contact with the larger group. Vulgar language and rude comments ensued, as well as statements about Kenyon's black eye. Cummings

acknowledged that he did not hear John Reynolds make any statements about Kenyon's eye [889-90].

As Cummings and his wife were about to leave, "they all stood up" to have a fight which did not occur at that time. Cummings then went to the register to pay, where Kenyon and King greeted him by name. He had previously known King, Kenyon and Hellwig while he was a security guard at a local mall. Cummings responded that he was well and advised them that they should "stay cool and behave and stay out of trouble" [886-88].

When Cummings and his wife left the East Side Pizzeria, he counted eight males and three females in the large group. He further recalled that another very well dressed couple came into the restaurant and joined that same group [888].

Jack Doxey told a similar, but more detailed, story. After helping his father, Robert Doxey, fix a flat tire on his mother's car on the evening of October 22, 1994, they decided at approximately 2:10 a.m. to go to the East Side Pizzeria. As Jack was parking his pickup truck near the side entrance to the restaurant, another car pulled in to his right. The occupants of the car were laughing, giggling and making noise, so Jack and his dad decided to enter through the front door of the restaurant [1146-48].

While Jack and Robert Doxey sat in the last booth on the left-hand side of the restaurant nearest the kitchen, the group from the car sat two tables from the front entrance of the pizzeria on the right side of the restaurant. Jack Doxey knew a few people in the group: Matt Sweatland, Brian Mooney and Sean Appleby. He also recognized John Reynolds whom he had known by name prior to that evening. Reynolds was sitting at a table behind the large group [1148-50].

Three guys then entered the restaurant, one with a bloody eye. They sat at the first round table next to the big group and things were peaceful for awhile before some heated conversations got started. Jack did not know who started the conversation, but believed that it was the large group. Individuals in the big group were telling one of the three guys that he needed to shave. The cook then came over and took the group of three outside. Less than a minute later, the three returned, sat at the counter. Things calmed down for a while until two males from the large group when into the rest room, followed by one of the three guys at the counter (whom Jack could not identify). This same individual came out of the rest room and told his two friends that they had better watch out because "they are gonna get their ass kicked when they left." Jack could hear this conversation because he was within touching distance of the group of the three [1150-54].

While both groups were eating their food, there was still animosity between them. Steven Hellwig was being harassed the most, but the only one who really seemed bothered by the comments was the guy with the bloody eye [1155-57]. Eventually, the three got up to leave and the last person out the door -- Hellwig -- was still being picked on so he challenged the larger group to go outside. Jack Doxey could not recall the specific words Hellwig used in his challenge [1158].

After a brief hesitation, someone whom he thought was Brian Mooney "busted for the door." Eventually, everyone from the larger group left, but Jack could not say specifically when John Reynolds exited the pizzeria [1158-59]. Significantly, he did not hear Reynolds say either "you don't have to take that shit" or "are you going to take that shit" [1169-70].

During the entire time that Jack Doxey was inside the East Side Pizzeria, he did not hear John Reynolds say a mean or nasty word to anyone in the small group. Reynolds was minding his own

business and did not challenge anyone to a fight or tease anyone about having a red eye or a scruffy beard [1167-70].

Robert Doxey gave similar testimony concerning the events he witnessed inside the East Side Pizzeria on the evening of October 22, 1994. He recalled that when Jack parked his pickup truck at the northwest corner of the restaurant a car containing a number of passengers pulled in beside them. Robert looked over at the car and saw Matt Sweatland, but did not recognize anyone else. The group seemed to be having a good time and was loud and boisterous. Robert felt uncomfortable around them and told Jack that he wanted to use the front entrance to the restaurant instead of the side entrance which the group used [1180-81].

Robert and his son set in the last booth on the left side of the restaurant. When the group from the car came in, they stopped at the counter to say "Hi" to a couple sitting there. They then sat down at a large table located near a window at the front of the restaurant. An unspecified period of time later, three men entered the restaurant. One of them had a red eye. At the time, Robert recognized the men, but did not know any of them by name [1183-85].

As the men walked into the restaurant, an unidentified person at the table where the large group sat said, "What's that red—eye CS doing in here?" "Red Eye" (Hellwig) appeared to take offense and approached the table. However, he did not start any trouble and simply said hello to Kerrie Haggerty [1185].

The three males he later found out were Steven Hellwig, Kevin Kenyon and Kevin King sat at a table near the larger group. Someone at the other table looked over and said, "Buy a razor and shave, you hippie." Hellwig became angry and responded, "Let's go outside and settle this." Robert Doxey recalled that the waitress, Gayle Wheeler, and the cook, Ray Seeley, approached Hellwig and

his friends. Seeley told them, "You're outta here, this ain't going on," and took the three men outside [1186-87].

Hellwig, Kenyon and King were allowed back into the restaurant, where Wheeler announced loudly enough for everyone to hear, "If you just sit down here, eat your breakfast, you can sit down. If you are gonna cause anymore trouble, even look over at that table, you are outta here." She then led the three over to the counter area within an arm's length of Robert Doxey and his son [1186-87].

After they were seated, both groups ate. During this time, Robert noted that Pam Brochu and her boyfriend spoke to Hellwig about a neighbor they both knew [1187]. Robert also heard comments directed from the large group towards the three at the counter. Some of the comments were simply said loud enough for the King group to hear, but were not obviously directed toward the counter area. After some of these statements were made, Robert saw John Reynolds for the first time that evening. Reynolds went over to talk to Hellwig, but Robert could not hear what was said [1187-89].

Upon hearing the comments from the large group, Kevin Kenyon became visibly upset and stood up a number of times. Robert Doxey told Kenyon not to worry about what was being said and to just finish his breakfast, go home, get some sleep and in the morning he would realize that this was nothing he needed to react to. Kenyon ignored him several times until Wheeler pointed out that Robert was talking to him. Kenyon then turned around and Robert shook his hand saying, "I'm telling you just don't let this bother you. Just let it go. It's nothing" [1189-90].

Both before and after his conversation with Kevin Kenyon, Robert Doxey saw John Reynolds come over to talk to Steven

Hellwig a number of times. Robert could not, however, recall anything said between Reynolds, Hellwig, Kenyon and King [1191].

Someone from the larger group then went into the restroom and Kenyon followed him in. Matt Sweatland entered the restroom after Kenyon. When they came out, Kenyon went to the counter and "said they were gonna get their asses kicked when they left" [1191-92].

Eventually, Hellwig, Kenyon and King went to the register to pay their bill. While they were doing this, Robert Doxey heard more "jawing" from the patrons at the large table. He did not pay attention to what was being said because Hellwig and his friends were leaving. However, after King and Kenyon left, Hellwig spun around in the doorway and said, "Come out in the parking lot, we'll settle this." There was a brief moment of silence and then Brian Mooney got up and said, "Let's go" [1193-94].

The rest of Mooney's group did not appear to want to go outside until, after "quite a while," one of the Appleby boys who "was just sitting there like boiling . . . he just shot right up and Brian was standing behind him and he came up so fast that it threw Brian right up against the wall, and then he started for the door and everybody else just hopped up and followed suit . . ." Wheeler and Seeley told them, "You are not going out that door," but the group paid no attention to them and left the restaurant [1194-95].

Significantly, while Robert Doxey clearly recalled Brian Mooney being the first one to exhort the rest of his group to go outside and one of the Applebys leading the way out the door, he did not see John Reynolds exit the building. In fact, Robert could not recall seeing Reynolds at any time after he spoke to Hellwig at the counter [1196]. Further, while Reynolds was talking to Hellwig, Robert observed that he was smiling and that "[t]hey were just talking like friends." He did not feel that John Reynolds behaved

inappropriately at any time and noted that Reynolds did not curse or taunt anyone. Essentially, Robert felt Reynolds was minding his own business [1206-07].

Gayle Wheeler had worked as a waitress and cook at the East Side Pizzeria for approximately fifteen years and had known who John Reynolds was all his life, although she had never been introduced to him prior to October 22, 1994. Reynolds came into the restaurant with Matt Sweatland at approximately 2:00 a.m. and was joined by Brian Mooney, Kerrie Haggerty, Shawn and Shane Appleby, Carl Hollamby, another Haggerty girl and Troy Fusco. They sat at one big table near the front window. Cory Shea and his girlfriend came in later and sat at a smaller table at which Sweatland and Reynolds subsequently joined them. Wheeler knew all of these people [1408-12].

A short time later, Kevin King, Steven Hellwig and Kevin Kenyon arrived. As they came through the door, Shawn Appleby said something about Kenyon's bloodshot eye. Kenyon immediately wanted to fight and went outside where he stood near the window motioning the Applebys' group to come out. Wheeler was taking orders at their table at the time and would not let anyone go out and fight. She recalled that Hellwig and King remained at the front door during all of this and did not get involved [1412-14].

Ray Seeley then came over and wanted to make Kenyon, Hellwig and King leave. However, Wheeler talked to them and the three promised that they would be quiet, so she let them remain. She also told them that she would call 911 if there were any further problems. When the three men started to sit at a table right next to the larger group, Wheeler told them to sit somewhere else, so they chose the counter [1414-15].

As the evening continued, some stares and remarks were exchanged between the two groups and Wheeler asked Hellwig and

Kenyon to look elsewhere and to keep quiet. When the three had finished their breakfast and paid at the register, they chose to pass by the larger group's table. Kenyon stopped and made a remark which Wheeler did not hear. Then, as the three men were leaving through the front door, Steven Hellwig turned around and challenged the larger group to a fight with Kenyon's support. King stood back and did not say anything [1418-19].

For a moment, nothing happened. Then, as Wheeler was taking a sandwich to Cory Shea, John Reynolds got up to leave. When Wheeler tried to stop him from going outside, Reynolds replied that he just wanted to go talk to Steven Hellwig, his sister's brother-in-law. Wheeler acknowledged that she knew of the family connection between Reynolds and Hellwig, but told Reynolds that he did not need to go outside. Reynolds brushed her aside and left the pizzeria [1419-20].

Wheeler next recalled that Shawn Appleby followed Reynolds out the door. Wheeler also unsuccessfully tried to stop Shawn from leaving. The rest of the group then exited through both the front and side doors. Wheeler immediately called 911 [1421].

Larry Bedow, a restaurant patron that evening, also saw John Reynolds stand up after Steven Hellwig issued his challenge. As Reynolds calmly walked toward the door, Bedow asked him to sit down. Reynolds, however, continued out the door. During the ten to fifteen minutes that he was in the pizzeria, Bedow did not see Reynolds do anything obnoxious or say anything rude to Kenyon, Hellwig and King [1030-32, 1046-47].

The cook that evening, Ray Seeley, recalled that a large group came into the restaurant between 1:15 and 1:30 a.m. Seeley identified the members of this group as Brian Mooney, Cory Shea, Matt Sweatland, Kerrie Haggerty, Haggerty's sister, John Reynolds, Troy Fusco, Shawn Appleby and Shane Appleby. He recognized

each of these individuals, but was not a friend or associate of any of them. Seeley knew that evening that John Reynolds and Steven Hellwig were related by marriage [1370-73].

Approximately twenty to thirty minutes later, Steven Hellwig entered the pizzeria with Kevin Kenyon and a third man Seeley did not know at the time, but later found out was Kevin King. As they walked in, someone in the larger group insulted one of the three and words were exchanged back and forth. Wheeler asked that the groups stop exchanging words and Seeley asked King and Hellwig to step outside. Kenyon remained talking to Wheeler [1374-75].

Once outside, Seeley told King and Hellwig he thought it would be better that they find somewhere else to eat. They responded that all they wanted to do was eat and that there would not be any problems. Seeley stuck his head into the restaurant to ask Wheeler for her opinion and they decided to let the three men remain in the restaurant [1374-75].

Upon re-entering the restaurant, the three men wanted to sit at a table right next to the larger group, but Seeley and Wheeler encouraged them to sit at the counter. After they settled themselves, the two groups were rude to each other, making facial expressions and exchanging words. While this was going on, Seeley saw John Reynolds talking with people of both groups [1375-76, 1378].

Eventually, the three men at the counter paid their bill and chose to walk by the group at the large table and exit out the side door rather than simply walking out the front door. As they left, Seeley heard one of the three men say something to the effect that, "if somebody was real men they'd take it outside." No one in the larger group responded to the comment [1376-77].

A short time later, John Reynolds left the pizzeria. Seeley was in the kitchen area at the time and did not hear Reynolds say anything as he left (*n.b.*, Gayle Wheeler was out in the table area when Reynolds told her that he was going outside simply to talk to Steven Hellwig, to whom he was related by marriage [1419-20]). Seeley then went over to the rest of the group and tried to stop them from following Reynolds out the door. They just nudged him aside, so he followed them out the door [1377-80].

Curiously, a report filed by State Police Investigator Travis stated that on April 25, 1995, Seeley had told the Investigator that "the Appleby boy with the beige knit shirt was the first one out the door." At trial, Seeley denied ever making this statement [1401].

Pamela Brochu was a customer at the East Side Pizzeria on the same night. She and her fiancé sat at a table near the restaurant counter and observed a group of about seven people seated at a large table making derogatory comments about three men at the counter. She knew Steven Hellwig because he lived across the street from her at the time, but she only later found out the names of the other two guys sitting with him at the counter. One, Kevin Kenyon, got "kind of rude" and told them to "Shut up and leave us alone." Brochu then saw someone from the large group whom she did not know come over to Hellwig and tell him that he was calming them down and everything was gonna be okay. However, she heard this same person go back to the larger group and refer to the guys at the counter as "skuzbags." While they were still in the restaurant, Hellwig told her that his brother had married the sister of the guy who had come over to talk to him [1331-38]. Brochu saw John Reynolds talk to Hellwig more than once that evening [1367-68].

When Kenyon, Hellwig and King got up to leave, someone from the larger group whom Brochu could not identify insulted Hellwig, prompting him to respond, "If you have got a problem with me, then let's take it outside and we'll take care of it now."

The guy who had insulted Hellwig went back to eating his sub, but another unidentified guy sitting at a smaller table behind the larger group's table stood up and said, "Hey, are we gonna take this shit from them, let's go get them." Then he and another man who was sitting with him started heading for the door. Significantly, although Hellwig had identified John Reynolds for Brochu a short time before, she did not claim that Reynolds was the guy who stood up and urged the group to go after Hellwig and his friends [1338-39].

As the two men from the smaller table proceeded toward the door, Ray Seeley (the cook) tried to stop them, to no avail. The larger group then left the restaurant, followed a short time later by Robert and Jack Doxey and her fiancé, Jim Cheesman [1339].

Several people in the large group also explained the events of October 22, 1994, to the trial jury. At 9:00 p.m., Shawn Haggerty (who plead guilty to Manslaughter in the Second Degree in this case) met his twin brother, Shane, and a number of other friends at Kerrie Haggerty's apartment: Matt Sweatland, Suzie Haggerty, Kerrie Haggerty, Suzie Shea, Troy Fusco, Brian Mooney, and Brian's friend, John Reynolds. Just about everyone was drinking beer and after a couple of hours they decided to go to "Granny Arona's," a bar in Olean -- though Shawn could not say whether John Reynolds went with them. After drinking beer for an hour and a half, Shawn rode to the Haskell Inn with Cory and Susan Shea [1077-81, 1113].

The entire group ended up at the Haskell Inn, including John Reynolds. They stayed there until the bar closed at 2:00 a.m., then Shawn and all his friends went to the East Side Pizzeria to get a bite to eat. Reynolds went with them, but Shawn did not know how he got there. The group entered and sat at a table in front of the cashier. They may have used more than one table because one could not accommodate everybody. Reynolds was seated at his table [1082-86].

As they sat at the table, Shawn saw three guys walk into the restaurant. One of them had a "real red eyeball" which caught Shawn's eye. Having a "little buzz" from the four or five beers he had consumed that night, Shawn turned to his brother Shane and said, "Look at this guy's eye," but neither he nor any of his friends said anything vulgar to the man, who Shawn later found out was Kevin Kenyon [1082-89].

As Kenyon approached their table, Shawn's twin brother, Shane, told Shawn to stand up. He did and Kenyon got close to his face and asked if Shawn had a problem. Shawn responded, "I don't want no problem." During this confrontation, Steven Hellwig was talking to someone at his table, but Shawn did not know who that was [1089-90]. Kenyon challenged Shawn and his friends to a fight, then walked out the front door with King and Hellwig. The three guys just stood outside looking in through the front window and Shawn's group ignored them. When they finally came back inside, Gayle Wheeler told the three that she did not want any trouble and that they were to sit on the other side of the restaurant. She also approached Shawn and his friends and warned them they would have to leave if they caused any problems. They assured her that there would be no trouble [1091-94].

Kenyon, Hellwig and King sat themselves at the counter near the kitchen. Shawn could not recall any comments being traded back and forth between the two groups as he and his friends ate and talked. More specifically, Shawn did not hear John Reynolds say anything to the three guys at the counter. Just as they finished eating, Kenyon, Hellwig and King went to the cash register to pay their bill. The two groups were within touching distance of each other. After paying the bill, the three men turned around to face Shawn's group and both Kenyon and Hellwig challenged them to a fight outside. One of them -- although he cannot say who -- said, "When you guys come outside, we are gonna kick your ass" [1095-96, 1116].

After the three men left the restaurant, Shawn heard John Reynolds ask Brian Mooney, "Are you gonna take this shit?" Mooney -- through whom Shawn knew John Reynolds -- then got up and ran for the door, but Shawn stopped him. He then exited the restaurant first and, upon opening the door, Shawn found Kenyon on the sidewalk facing him. When Kenyon put his hands up and said, "Are you ready to go?", Shawn punched and knocked him to the ground before proceeding toward Hellwig and King [1097-98, 1113].

Shane Appleby pled to Criminally Negligent Homicide in the death of Kevin King and also testified at trial. He, too, was drinking with the rest of the group at Kerrie Haggerty's apartment and at the two bars. While he did not see John Reynolds at Granny Arona's, Shane did see him at the Haskell Inn. They stayed at the Haskell Inn until closing, then went to the East Side Pizzeria. Shane could not say whether Reynolds had been drinking alcohol at either establishment, but did acknowledge that he himself had been drinking for a few hours [1121-25].

Shane rode to the pizzeria with someone from the group and did not know how Reynolds got there. He sat at a round table in front of the cash register and Reynolds sat at a smaller table to his left. The two tables may have been pushed together. Shawn was to Shane's left and Reynolds was further to the left [1125-28].

Three men walked into the pizzeria, the first with a red eye which looked as if it had been punched. The guy with the red eye was staggering and appeared drunk. Someone whispered, "God, someone hit him," whereupon "Red Eye" approached Shawn Appleby and asked, "What the fuck are you looking at?" Shawn stood up and the waitress, Gayle Wheeler, said she did not want fighting in the restaurant. He then convinced Shawn to sit down [1128-30].

While he could not recall the three guys leaving the restaurant at that point, Shane later saw them sitting at the counter. He denied that words were exchanged between the two groups. Eventually, the guys at the counter got up to leave and one of them approached the table and said, "All right (sic), you want to fuck with us, let's go outside right now." Shane thought John Reynolds then said, "Are you gonna take that shit?", and Brian Mooney stood up and made a comment about the guy's beard [1131-36].

Shawn Appleby was the first to follow the three men out the door to confront them. Shane was right behind Shawn and he did not know who came out after them, but, without doubt, John Reynolds did not lead a charge out the door [1137-38].

Carl Hollamby was also with Shane Appleby and the others at the East Side Pizzeria. While they were all enjoying being together, he did not think the group was being obnoxious to anyone. When Kevin Kenyon, Steven Hellwig and Kevin King walked in, Shawn Appleby commented on Kenyon's red eye, saying, "Hey, this must be the kid that got in the fight at the Haskell Inn" [1450-54]. Kenyon "erupted" and said, "blankety blank, we are going outside." While Kenyon was outside gesturing through the window for Shawn to come out, Shawn remained in his seat [1453-54].

Hollamby recalled that Kenyon, Hellwig and King then sat at a small table near he and his friends. There was obviously some tension, but John Reynolds just sat there and kept to himself. Brian Mooney and Steven Hellwig, however, were sitting close to each other and had a verbal altercation. Gayle Wheeler then moved Kenyon, Hellwig and King to the counter and Reynolds told Mooney, "This is my brother-in-law's brother, let's not have any of this." Things then calmed down and everyone went back to eating [1454-56].

There was still tension in the air, so when Kevin Kenyon looked toward their table, Hollamby thanked him for sitting down. Kenyon responded that he did not have a problem with Hollamby, but did have a problem with his friends. John Reynolds then went over to Hellwig and talked with him. When Reynolds returned to the table, Hollamby and Matt Sweatland left the restaurant, only to return because Sweatland had forgotten to pay his bill (Hollamby did not have a bill because he had not ordered anything). Wanting to leave, Hollamby asked Reynolds for a ride home. Reynolds agreed, but a few minutes later a "ruckus" started [1455-57].

Trouble started when Kenyon, Hellwig and King walked by Hollamby's table. Kenyon said, in substance, to Shawn Appleby, "I'm gonna be waiting for you outside and we are gonna go." Shawn told him to leave. When Hellwig got to the door, he turned around, pointed at Brian Mooney and said, "I'll be waiting for you too." The three men then left the pizzeria. About twenty seconds later, someone at the end of the table where Mooney, Sweatland, Shawn Appleby and Reynolds were sitting said, "Are we gonna take this shit?" -- but it was not John Reynolds who made the statement [1458-59, 1470-71]. The entire group then got up and exited the restaurant, but Hollamby did not know who went out the door first. When he got outside, Hollamby did not see John Reynolds anywhere [1459, 1470-71].

Like Hollamby, customer Larry Bedow -- who was not with either group -- did not hear John Reynolds urge anyone to fight, though Bedow was seated only ten feet away from Reynolds. He saw him merely get up and walk calmly to the door [1047, 1058].

Significantly, even Kevin King's close friend, Kevin Kenyon, did not implicate John Reynolds in King's death. Kenyon was friends with Steven Hellwig and King and met them at the State King (a small tavern in East Olean) around midnight. While they were at the State King, Kenyon drank five to six beers. Hellwig

was also drinking, but Kenyon could not recall whether King was also. At some point, they decided to go to Haskell Inn and arrived there shortly after 1:00 a.m. The three men remained at the Haskell Inn until closing and both Kenyon and Hellwig continued to drink beer [884-900].

While they were at the Inn, a friend by the name of Andy John asked that they give him a ride home. After dropping Andy off at his residence, Kevin King drove the three in Stephen Hellwig's car to the East Side Pizzeria for breakfast. As they entered, Kenyon noticed a big crowd of kids and heard one of them say, "Look what the dog drug in." He knew that the comment was directed at the three of them, but did not know whether it was meant for anyone in particular. Kenyon had not had any prior trouble with anyone in the group and knew John Reynolds "pretty well" from just seeing him around [901].

Kenyon and his friends sat down at a table to the right hand side of the door. Further remarks were made to them by individuals in the larger group. In particular, someone asked, "What the fuck are you lookin' at, red eye?" Others called them "scruffy bastards." They were discussing whether they would remain at the East Side Pizzeria or go to Perkins when Gayle Wheeler came over and told them to "Ignore them guys, they have been jerks all night. Come sit up at the counter." Even after they moved to the counter, members of the larger group continued to make nasty comments. Kenyon finally walked over to John Reynolds and said, "Your friends are being assholes. You should know better, you know" [903-04]. Kenyon could not hear whether Reynolds spoke to the others around him, but did acknowledge that he had never had any previous trouble with Reynolds and, in fact, said "You're okay" to Reynolds when he came over to speak with him [914-15, 918, 929].

After returning to the counter, Kenyon went to use the bathroom. A few seconds later, a tall, blond haired kid from the

larger group—specifically not John Reynolds according to Kenyon -- came into the bathroom and asked, "Are you Kenyon?" When Kenyon replied that he was, an argument ensued. Kenyon then went back to Hellwig and King and told them, "There's going to be some trouble, I know there is." Hellwig and King told him to simply ignore the others [905-06, 919-20].

While King and Kenyon were still eating, Hellwig got up to pay the bill. When King and Kenyon joined him at the register, Kenyon heard Hellwig tell someone in the other group, in substance, "I'm not gonna fight in a public place" and, "I might not be able to take all of ya, but I'll take you one-on-one." Hellwig also said, "If you ain't got nothing nice to say, don't say nothing the fuck at all" [906-07]. Kenyon then exited the pizzeria with Hellwig and King through the side door. Kenyon explained that while they were looking back at the other group as they were leaving, none of the three said anything to them [908]. Notably contrary to the prosecution's "ringleader" theme, Kenyon did not recall John Reynolds saying an angry word to Kenyon and his friends [917].

Steven Hellwig testified to similar events and also characterized John Reynolds as a "peacemaker." He had known Kevin King since they were both about five years old and they went out together on the evening of October 22, 1994. Hellwig picked King up at his house and they drove to Rod Corwin's house in the town of Olean. Corwin was Hellwig's friend and they sat around a bonfire and talked with a couple of friends. Neither Hellwig nor King had anything to drink before they left Corwin's house between 11:30 p.m. and 12:00 a.m. to go to the State King [932-34].

At the State King, they met Andy John and Kevin Kenyon. The four then left that tavern and went to the Haskell Inn where they had a couple of beers and watched a band play. At approximately 2:15 a.m., King, Kenyon and Hellwig took Andy John home and then went to the East Side Pizzeria. King was driving Hellwig's car

because he had had the least amount to drink and Hellwig was tired from working on a shed earlier that day with both King and Kenyon. They parked at the front of the restaurant and entered through the front door [935-36].

As he came through the door, Hellwig noticed a large group of people seated at three tables. He heard someone say, "Wow, would you look at what the dog drug in" and, to Kenyon, "Hey, what's up, red eye?" [937]. While Hellwig and King ignored them, Kenyon became upset and approached the group to say, "Why don't you guys leave us alone, we are not bothering you." Hellwig and King then dragged Kenyon to a table near the door where they sat down [937].

Hellwig had never had any trouble with anyone in the other group and recognized John Reynolds, whose sister was married to Hellwig's brother. While Reynolds did not say an unkind thing to them the entire evening, other people he was with began calling Hellwig and his friends "dirt bags" and "scruffy bums." When one guy insulted Hellwig further, Hellwig told him to either go outside to settle it with him or keep his mouth shut. He then walked out the door with Kenyon and King. While the larger group remained at their tables, Gayle Wheeler followed them out, but did not ask them to leave. They discussed going to Perkins, but decided to go back into the pizzeria because it was closer to home [938-39].

Upon re-entering the restaurant, they sat at the counter where they continued to be subjected to verbal harassment from the larger group, although none of it came from John Reynolds. Kenyon again became upset and told the other group to leave them alone. Whenever he did this, Hellwig and King would tell him to sit down and mind his own business because they did not want any trouble. The problems continued, however, when Kenyon went into the restroom and was followed in by a blond male Hellwig thought was Matt Sweatland. When Kenyon came out, he told them that the

blonde guy had said they were "gonna get our asses kicked as soon as we left." During the course of the evening, Sweatland had been saying many obnoxious things to them and had gotten in a face-to-face confrontation with Kenyon, which was ultimately broken up by Hellwig and King [939-40, 992-95].

John Reynolds did come over to Hellwig and say, "Steve, don't blame me for what my friends are doing here." While Hellwig simply told him to sit down, Hellwig did recognize that Reynolds was not angry and was acting as a friend. Being related by marriage and having fished together in the past, Hellwig considered Reynolds a pretty good friend. Hellwig was certain that Reynolds did not say anything nasty to them that night [941, 992-93, 995].

When Hellwig got up to pay for his meal, one of the guys with the other group -- not Reynolds -- threatened to hold him down and shave him the next time he saw Hellwig out. Hellwig responded, "If you guys got a problem with me, we'll go out and get it settled right now or else your mouth shut and keep it shut every time I see you out." He then walked out of the restaurant followed by King and Kenyon. As Hellwig was getting into his car, Kenyon went up to the window of the restaurant and started to say something, but was stopped by Hellwig and King who grabbed him and tried to take him to the car [940].

Hellwig then looked through the restaurant window and saw John Reynolds heading for the side door through which they had just left. Just as he was asking John what was going on, someone else came out the door and came over Reynolds' shoulder to hit Hellwig. The next thing he knew, there were people all around him and he was being beaten. John Reynolds was not one of his attackers [944-46, 949].

In sum, the varied recollection of these many witnesses demonstrated primarily that John Reynolds did not engage in any name-calling or abusive conduct toward Kevin King and his friends. In fact, John was on friendly terms with Steven Hellwig and tried to smooth things over between the two groups. Even Hellwig -- King's friend -- acknowledged that John approached him as a friend and asked Hellwig not to blame him for what his friends were doing. Moreover, Kevin Kenyon -- himself a volatile participant in the hostilities -- walked over to John and said, "You're okay."

Further, the testimony very clearly showed that John Reynolds did not lead any type of "charge" out the door after King and his friends. While, as Gayle Wheeler explained, John did walk toward the door in order to talk to Hellwig, his sister's brother-in-law, the "charge," if any, was led by Shawn Appleby (who, by his own admission, also threw the first punch), followed closely by his brother Shane and Brian Mooney.

## II. Altercations Outside the Restaurant

The descriptions of the physical confrontations in the parking lot of the East Side Pizzeria varied from witness to witness, but one important fact remained constant: in this wholly circumstantial case, not a single witness saw John Reynolds strike, punch or kick anyone, much less Kevin King. Judging from the verdict, John Reynolds' only mistake was being present in an area where fights were occurring.

Shawn Appleby quite frankly admitted that he punched out Kevin Kenyon and Kevin King. First, as he left the restaurant, Shawn saw Kenyon standing on the sidewalk facing him, with Hellwig and King behind him. When Kenyon put his hands in the air and said, "Are you ready to go?", Shawn punched him so hard that Kenyon fell to the ground. He then moved past Kenyon to get at Hellwig and King. When those two separated, Shawn went after

Kevin King and landed a powerful blow to the area of King's mouth, causing King to "crumple" to the ground near the driver's side front quarter panel of a red pickup truck. Shawn saw his brother, Shane, take a swing at King, but did not know if he, too, connected [1097-98].

While he stood over Kevin King, Shawn Appleby saw Kevin Kenyon lying partially on the sidewalk and Steven Hellwig in a fight immediately in front of the pickup truck. In the approximately seven foot distance between Shawn and the front of the truck, there were several people fighting. Hellwig came toward him and said, "How about some one-on-one," so Shawn knocked him to the ground with one punch [1099-1103, 1118-20].

Although in his plea colloquy he had said John Reynolds was in this seven foot area where everyone was kicking and punching, Shawn acknowledged that he did not see John punch, kick or strike anyone, particularly Kevin King; he was simply in an area where a fight was occurring. In fact, at no time did Shawn either hear John Reynolds request or command someone to punch, kick or strike anyone or see him aid anyone in punching, kicking or striking somebody else.

Kevin Kenyon gave a slightly different description of the fight, except in one respect; he, too, did not see John Reynolds strike Kevin King at any time. As he was walking to the car after leaving the building, Kenyon felt a blow to the back of his head. He fell to his knees and another punch knocked him to the ground. He lay there covering his face and continued to be punched and kicked. When Kenyon attempted to get up, he was only knocked down again. He could not say who was striking him [908-10].

Kenyon also did not know what was happening to Hellwig and King during this time. In particular, he did not observe John Reynolds or anyone else striking his friends. When the fighting

stopped, Kenyon lifted his head and saw Steven Hellwig on the hood of his car and Kevin King lying on the ground. Kenyon sustained a split lip, sore back and ribs, and a "soft spot" on his head, but did not seek treatment until a week later [910-12].

Steven Hellwig's involvement in the physical altercation began when he approached John Reynolds outside the pizzeria to ask him what was going on and, as John started to answer, another guy came over John's shoulder and started hitting him. Hellwig was then surrounded by people who were punching him from every angle. He was pushed up against the back of a truck during the course of the fight and several people continued to beat him. When the fight was over, Hellwig walked to the front of the truck and saw Kevin King lying on his stomach in the parking lot. It appeared he was trying to get up, but when Hellwig asked if he was all right, King only groaned [946-51].

As Hellwig looked for his glasses around the front of the truck, he told "them guys" that they were "gonna pay for this." A guy in a tan sweater then ran over and punched him in the head and others pushed him up against his car (which was parked right next to the truck) and beat him again. When this second confrontation ended, Hellwig kneeled over King to check on him, but Gayle Wheeler grabbed him by the shoulder and told him to get away from King [951-52, 962, 974].

During questioning by the police at the scene, Hellwig told Officer Sean Obergfell that he did not see John Reynolds do anything and, the next day, he also told his brother that he did not see John in the fight. When asked at trial whether he had told other people that John Reynolds was not involved in the fight, Hellwig responded, "From what I seen, he wasn't." Hellwig was, however, able to tell the Sheriff's Department that Shawn Appleby and Cory Shea attacked him and informed investigators that Pam Brochu had seen Brian Mooney strike him [985-86, 1000-01].

Notably, when Hellwig gave the statement identifying Appleby, Shea and Mooney as his attackers, he made no mention of John Reynolds being involved. Moreover, as he advised the trial jurors, Hellwig not hear John say anything unkind to anyone that night and he also never heard John direct, command or encourage anyone to fight. Further, Hellwig did not see John aid anyone in the fight [992-93, 1001, 1006-07].

Shane Appleby also did not see John Reynolds in a physical altercation that evening. He recalled following Shawn out the door and seeing him punch Kevin Kenyon to the ground before running over to Kevin King and hitting him. Shane also landed a blow on King and watched him fall to the ground in the middle of the parking lot (as opposed to in front of the pickup truck parked near the corner of the restaurant building, as described by his brother). During the incident, Shane saw John Reynolds walking around another fight going on between two vehicles near the corner of the building, but did not see him take part in the melee. Shane was certain it was John Reynolds and did not observe him punch or kick anyone [1138-39, 1142-44].

John Reynolds' non-involvement in the fight which led to Kevin King's death is also borne out by Carl Hollamby's observations of the incident. Hollamby ran out of the pizzeria with the rest of the group, but did not see John Reynolds anywhere. He did, however, see Cory Shea and Brian Mooney fighting Steven Hellwig near the corner of the building and Kevin King lying motionless on the ground. Not wanting to be near the fighting, Hollamby then went back inside the restaurant [1460].

When Hollamby heard sirens, he ran back out and saw King still lying in the same position. Thinking King was unconscious, Hollamby yelled to his friends, "Let's go, they're gonna arrest some people here for assault." He then ran to a building next to the pizzeria, where he realized no one had followed him. Going back to

the pizzeria, Hollamby saw Hellwig kneeling near King and heard Hellwig challenge Shawn Appleby to go "one-on-one" with him. They started struggling behind a truck and continued until Brian Mooney and Kerrie Haggerty came over to pull Shawn out of the fight because the police were coming. Hollamby then joined Mooney and Haggerty in a flight from the scene. During all of this, Hollamby never saw John Reynolds and never heard him command, solicit or encourage anyone to fight [1460-65]. He also pointed out that although there were ten people in his group, not all of them fought [1466].

Larry Bedow saw both groups leave the restaurant, and stayed at the counter for less than a minute before going outside to see if there was anything he could do. Upon exiting the building, he saw Kevin King lying on the ground near a truck. Everyone was running around, but no one was assaulting King. Bedow checked King's jugular and found he had a pulse and was breathing. As he was doing this, Steven Hellwig was on the other side of the truck fighting two men [1032-37].

Bedow walked back into the restaurant and saw Gayle Wheeler on the telephone. He immediately went back out and saw Pam Brochu pushing one of the girls who was with the large group. When Bedow told her that she did not need to start up anything else, Brochu replied, "Well, the bitch doesn't need to be kicking him either." Bedow then checked King again and found that he had not come to, but did have a pulse [1037-38, 1050].

During the five to seven minutes Wheeler was on the telephone, Bedow watched the fighting. Even though he was focused on the skirmishes during this lengthy period, he did not see John Reynolds anywhere and did not see anyone punch or kick King. In fact, during the entire time he was outside, Bedow never saw John Reynolds near Kevin King, or anywhere else for that

matter. He also did not hear John direct, command, solicit or encourage anyone to fight [1050-53].

When she saw everyone going outside, Gayle Wheeler immediately called 911. After notifying the police, she walked out to see what was happening and observed a "bunch of people kinda crowded all together and down on their knees and on their feet and saw fists flying and feet swinging" in front of Jack Doxey's truck. The people in this group were not laying on top of anyone, but were leaning in and reaching over each other. Wheeler could not tell how many were in the bunch and could not see their faces. She did not see who they were hitting or kicking [1421-23, 1431].

The group broke up when someone yelled that the police were coming. Wheeler saw Shawn and Shane Appleby, Brian Mooney, Cory Shea, the two Haggerty girls, Pam Brochu and John Reynolds as the group dispersed. She assumed that Reynolds had been with all the people crowded together in front of Doxey's truck simply because she saw him running away from the area of the fight. However, Wheeler did not see John Reynolds punch or kick anyone or even attempt to do so, and admitted that she did not see him anywhere during the fight. When everyone left, she saw Kevin King lying beneath Steven Hellwig [1423-28].

Assuming that people were fighting outside, Jack Doxey left the pizzeria to check on his brand new red and silver pickup truck. As he approached, Jack saw people fighting between the passenger side of his truck and a car parked next to it. He did not notice who was involved in the altercation and just wanted to move his truck. Jack decided to leave the truck alone because he was afraid someone might be beneath it and started to return to the restaurant when he saw two guys fighting at the corner of the building. Neither of them was John Reynolds and, when Jack told one to stop beating up on the other, the guy simply picked Jack up and started carrying him toward the front of the restaurant [1160-62].

Just then, Jack's father -- Robert Doxey -- came out to check on him. The guy holding Jack put him down and grabbed his father. As the two fought, another guy came from behind some cars with a beer bottle which he used to strike Robert in the head. Jack's father and the two guys he was fighting with then disappeared inside the restaurant. When Jack looked back toward the front of his truck, he saw a person in a red and black flannel shirt lying on the ground "getting kicked and stuff like that." The kicking went on for about thirty seconds and was done by several people whom Jack could not identify by name [1162-64].

After checking on his father, Jack came out of the restaurant and saw people still fighting. The fight continued for about another minute, then stopped. The guy in the red and black flannel shirt was still lying on the ground near the driver's side front tire of his truck [1165].

In April 1995, Jack Doxey gave a statement to the State Police in which he stated that the guy in the red and black flannel shirt was being,

> kicked by a girl with black hair, dressed in black. A blonde girl, they call her Keri, and there were at least two or three guys from that table of nine, but I'm not sure who they were. And that "Sweatland, who I know, is near that group but I'm not sure what he was doing."

Jack did not see John Reynolds in the group or even hear his voice outside that evening and he did not see Reynolds fight anyone or even challenge anyone to fight [1170-73]. Significantly, while most people ran to their cars and peeled out of the parking lot when the fight ended, Jack saw John Reynolds remain at the scene for a time and then walk calmly to his car. He was not out of breath, his

clothes were not torn, and he did not appear to have been in a fight [1173-76].

Robert Doxey identified Cory Shea as the one who had hold of his son and then attacked him. After Jack pulled him out of the fight, Robert went into the bathroom to look at his bleeding nose. When he came back out of the bathroom and stepped outside to see what was going on, Robert saw a group of people standing in front of Jack's truck and other people just standing around watching. In the group in front of the truck, he could see some kicking through the "standing legs." He initially thought they were kicking something fluffy -- like a pillow -- but when the group dispersed at Gayle Wheeler's insistence, Robert saw Kevin King lying on the ground with Cory Shea standing above him talking to Wheeler [1196-1203].

Robert did not see John Reynolds at the corner of the building where the fighting occurred. Indeed, he did not see John from the time one of the Applebys ran out the door after Steven Hellwig until all the fighting was over and he saw John with his truck at the nearby Baer Auto Parts. John did not appear to have been in a fight and did not peel out of the parking lot when he left. Robert Doxey candidly admitted that, as far as he knew, John Reynolds could have been just watching the fight [1207-09].

Ray Seeley got a good look at the fight from about ten feet away and, although he was able to identify several people in the fight between the corner of the building and the pickup truck and car, he did not see John Reynolds involved in the melee. Seeley saw six to eight people fighting and recognized Cory Shea, Shawn Appleby, Shane Appleby, and Keri Haggerty as participants. Another girl was participating in the fight, but he did not know her name. After the group dispersed he saw that Kevin King and Steven Hellwig had also been part of the altercation. Hellwig was lying with his torso across King's upper body and both he and Wheeler

helped Hellwig up. Seeley did not, however, see John Reynolds anywhere until the fight was over and John drove by the restaurant in a pickup truck. Seeley also did not hear John direct or encourage anyone to fight that evening [1381-88, 1392-94, 1397-1400].

Pam Brochu also gave specific testimony as to who was involved in the fights outside the pizzeria. About five minutes after both groups left the restaurant, Brochu went out through the side door and saw Kevin King on his knees to her right being beaten by two men. Directly in front of her, Steven Hellwig was in a fight with three guys. After Larry Bedow intervened in Hellwig's fight, Brochu saw four males and one female striking King. She conveyed this information to the State Police the day after the incident. In a follow-up statement to investigators in April 1995, Brochu identified the five as Keri Haggerty, Brian Mooney, Shawn Appleby, Shane Appleby and Matthew Sweatland. Shawn and Shane were definitely kicking Kevin King [1342-43, 1351-52, 1355, 1360, 1362-64, 1369].

Brochu acknowledged before the trial jurors that she could not testify that John Reynolds was involved in the fighting outside the pizzeria. She saw him only after the fighting was over when he was getting into his truck and Gayle Wheeler told him not to leave. John replied, "I had nothing to do with this." In her statements to the State Police, Brochu never mentioned that John was punching or kicking Kevin King, but she did give the names of the four men and one woman who she did see beating King [1350, 1353, 1361, 1369].

As illustrated by the foregoing, not a single one of the many witnesses to this incident testified that John Reynolds fought anyone or encouraged anyone else to fight. This is consistent with the statement John gave the next morning to the Cattaraugus County Sheriff's Department. Voluntarily appearing at the station house at 7:45 a.m., John was interviewed by Lieutenant Detective Dennis John. In response to the detective's questions, John described events

inside the restaurant after Steven Hellwig arrived with Kevin Kenyon and another guy John did not know. He explained that when he and his friends left the restaurant "all hell broke loose." There were people fighting all over, but he did not get involved and could not say who was hitting who. The fighting lasted about five minutes and he got into his truck to leave after it was over. Just then, the police arrived, so John parked his truck and told Officer Sean Obergfell what had happened [1212-19].

During the interview, Detective John did not observe any indications that John Reynolds had been in a fight. In particular, the detective did not see any bruises or scratches on John's face and hands [1221-22].

On April 28, 1995, John Reynolds voluntarily returned from a job site in Pennsylvania to speak to State Police Investigators Donald Rieger and Paul Jackson about the events of October 22, 1994. No written statement was taken, but the investigators did keep notes of the interview. John explained that he and a group of friends went to the East Side Pizzeria between 2:00 and 2:30 a.m. to have breakfast. Investigator Rieger recalled that John indicated that three other men then walked in and one received some harassment. The three got up from where they were sitting and went outside, only to return and sit at another location in the restaurant. Some further harassment occurred, but there were no further problems. However, when the three guys left, one of the Applebys was the first one out the door after them [1225-29].

According to Investigator Rieger's recollection, John explained that when he left the building he went to "the point," which John explained was the point where the corner of the building met the sidewalk corner. He stood just off the sidewalk and watched three fights, but did not himself get involved. John told the investigators that he saw Brian Mooney, Keri Haggerty and Cory Shea in a fight with Robert Doxey, Shawn Appleby fighting first

Kevin Kenyon and then Steven Hellwig, and Matthew Sweatland fighting with Hellwig [1229-31, 1234-36].

John Reynolds has maintained his non-involvement and his innocence since day of the incident. None of the evidence presented at trial -- whether testimonial or physical -- refuted his assertion of innocence.

## III. The Medical Evidence

Dr. Justin Uku, Chief Medical Examiner for the County of Erie, conducted the first autopsy of Kevin King on October 23, 1994. After Dr. Uku came to conclusions as to the cause of death with which the People were not happy, the prosecution brought Dr. Michael Baden in to perform a second autopsy. Not surprisingly, his findings differed dramatically from Dr. Uku's. Upon review of the second autopsy findings, Dr. Uku changed his determination of the cause of death to conform to Dr. Baden's conclusion.

Prior to the autopsy, Dr. Uku was advised that the time of death was 4:32 a.m. and that Kevin King had been in a fight and was found at the bottom of a pile of people. The autopsy revealed that King had an abrasion on the right side of his forehead and two small abrasions on the bridge of his nose. His face and lips were blue and he had some blood in one of his nostrils. Dr. Uku also found bleeding in King's right eyeball [1256-61].

Dr. Uku found no skull fracture, but he did observe hemorrhaging in the chest, abnormal flexibility of the sternum, and frontal rib fractures, all of which caused him to inquire as to whether CPR had been performed -- which it had [1263-66]. Dr. Uku felt that CPR had caused the chest and rib injuries [1265-66].

In light of the information that King was found at the bottom of a pile, and given the blueness of his face and the hemorrhage in his right eye, Dr. Uku concluded that death was caused by traumatic asphyxia resulting from a heavy weight being placed on King's chest [1261-62].

Approximately seven months later, Kevin King's body was exhumed and a second autopsy was performed by Dr. Baden on April 17, 1995. During the course of this procedure, Dr. Baden saw no injuries to the arms, forearms or hands indicative of defensive or offensive wounds, but did observe three bruises on King's left chest which were not present when Dr. Uku examined the body. Dr. Uku may not have observed the bruising because he performed the autopsy before the body had rested for twenty-four hours, the point at which bruising may become more prominent due to settling of the blood in the body [1284-92].

Dr. Baden also found five rib fractures, but attributed only two of the fractures -- those which were not surrounded by hemorrhage -- to CPR. Around the remaining three rib fractures he found significant hemorrhaging which he did not believe was caused by the prior autopsy. This indicated to Baden that the heart was still actively beating when the hemorrhaging occurred, though the record reveals no basis for his further conclusion that the heart was not beating at all during CPR. Dr. Baden also felt that these three fractures were "not quite where one gets fractures from CPR" and concluded that they were caused by blunt force trauma [1292-95].

Further, upon reflection of the skin around the right eye (which had not been done by Dr. Uku), Dr. Baden observed a prominent hemorrhage which did not show through the skin. He also found bruising in King's mouth. While external examination of King's back did not reveal any bruising, when Dr. Baden made an incision at the midline of the lower back he found an area of

bruising which could also have been caused by blunt force trauma [1296-97].

In light of these observations, Dr. Baden concluded that Kevin King's death was caused by multiple blunt force injuries to his head and chest. He opined that the injuries to the chest caused King's heart to beat irregularly, resulting in fatal cardiac arrhythmia. He posited that the head injuries did not cause death and that King may have been lying on the ground when the chest and rib injuries occurred [1310-11].

Notably, however, Dr. Baden admitted that nothing in his findings would preclude Dr. Uku's original diagnosis of death by traumatic asphyxia, but he felt such a cause to be unlikely [1317-20].

Amazingly, when Dr. Uku reviewed the report of the second autopsy he decided to change his conclusion as to cause of death to conform to Dr. Baden's opinion. At trial, Dr. Uku could explain his abandonment of the traumatic asphyxia determination only by claiming that CPR could not have caused the rib fractures and was unable to give an explanation of why he came to that conclusion in light of his previous determination that CPR was the cause of the chest and rib injuries. He also felt that the hemorrhage around King's right orbit extended into the right eye, a fact of which he was unaware after the first autopsy and which suggested to him that the bleeding in the right eye was not caused by asphyxia. Dr. Uku did admit, however, that during the first autopsy he found all three indicators for asphyxia: (1) congestion of blood in the organs; (2) cyanosis (blueness or purple color due to lack of oxygen); and (3) tiny pinpoint hemorrhages. Because organs decompose after burial, Dr. Uku acknowledged that Dr. Baden would not have an opportunity to observe cyanosis or congestion [1269-75, 1278].

## POINT I

## THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE MORAL CERTAINTY STANDARD IN A WHOLLY CIRCUMSTANTIAL CASE AND ITS FAILURE TO PROVIDE EVEN THE MOST MINIMAL DEFINITION OF CIRCUMSTANTIAL EVIDENCE REQUIRES REVERSAL OF APPELLANT'S CONVICTION AND THE GRANTING OF A NEW TRIAL

As exhaustively detailed in the Statement of Facts, supra, the proof against John Reynolds was wholly circumstantial with not a shred of direct evidence upon which the verdict could be based. Consequently, appellant submits that the trial court was required to instruct the jury that appellant's guilt must be established to a moral certainty and in accordance with the rule of circumstantial evidence. The failure to so charge left the jury without proper guidance as to how circumstantial evidence should be evaluated, requiring reversal of appellant's conviction for manslaughter in the second degree.

Appellant raised this issue before the trial court in a motion pursuant to §330.30 of the Criminal Procedure Law. The court ultimately denied the motion, ruling first that trial counsel may not have preserved the claim by requesting a "circumstantial evidence charge" and second that direct evidence of appellant's guilt was introduced at trial. The court reasoned that appellant's alleged statement inside the restaurant -- "Are we going to take this shit?" -- constituted direct proof of John Reynolds' reckless state of mind [1811-12]. The trial court also stated that "[t]here was further direct evidence that defendant then led a charge of ten people out the door to confront three people in the parking lot. Given the hostilities that had occurred inside, a reasonable jury could *consider* that conduct reckless" (emphasis added) [1812]. The court emphasized that the lack of direct evidence of John Reynolds' participation in the beating of Kevin King was not dispositive of the

issue because the jury could have found reckless conduct by virtue of appellant's alleged "leading of the charge outside combined with the events which occurred outside" [1812].

As a preliminary matter, the preservation issue alluded to by the Cattaraugus County Court does not exist. The record unequivocally establishes that trial counsel made a clear and unambiguous request for the expanded circumstantial evidence charge. The trial court itself put appellant's request on the record, stating:

> The defense has requested a circumstantial evidence charge. I have reserved on that until tomorrow. My feeling at this point that there is some direct evidence which I think is all it takes to remove that charge, but I will again review that [1442].

Just before the commencement of summations, the court revisited the charging issues: ". . . the defense has asked for the circumstantial evidence charge, which I also decline to give. I just don't view this as a circumstantial evidence case" [1481].

Appellant submits that, in light of the trial court's own words, there can be no dispute as to the nature of the circumstantial evidence charge requested by trial counsel. The court clearly understood that counsel desired the expanded moral certainty charge on the ground that the proof against appellant was wholly circumstantial. Moreover, in placing the charging conference on the record, the trial judge evinced his understanding of the nature of the defense request by indicating that he believed a circumstantial evidence charge was not warranted because there was some direct evidence in the case [1442].

To now suggest that trial counsel was not clear enough in his request is disingenuous. At the time the instruction was requested, the court clearly understood that appellant wanted the jury to be instructed on the moral certainty review standard. Accordingly, appellant respectfully requests that this Court find that the issue presently before it has been squarely preserved.

With respect to the merits, the trial court's decision reflects a misapprehension of the nature of circumstantial evidence. Appellant was convicted of violating §125.15(1) of the Penal Law which states:

> A person is guilty of manslaughter in the second degree when:
>
> (1) He recklessly causes the death of another person.

In relevant part, Penal Law §15.05(3) defines "recklessly" as follows:

> A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in that situation

Consequently, the petit jury was required to determine whether the proof established beyond a reasonable doubt (1) that appellant was aware of and consciously disregarded a substantial and unjustifiable risk that his conduct would cause the death of Kevin

King, (2) that appellant's disregard of the risk of death to King was a gross deviation from the standard of conduct that a reasonable person would observe in that situation, and (3) that appellant did, in fact, cause the death of Kevin King. The jury was so instructed in the trial court's final charge [1545–49].

Fisch on New York Evidence provides an appropriate framework for this discussion. The nature of circumstantial evidence is set forth quite simply as follows:

> Circumstantial proof is the process of establishing a proposition by means of an inference drawn from the assertion of another proposition . . .
>
> All evidential proof is accomplished as a result of one or more inferences to be drawn from the evidence to the facts in issue. If the only inference involved is one from the assertion of the fact to the truth of the matter asserted, the evidence is testimonial, or as it is sometimes termed, direct. But if, in order to assert a proposition as true or probable it is necessary to draw any other inference, then the proof is circumstantial. For example, in order to establish that the accused is the person who murdered X, a prosecution witness testifies that he saw the defendant stab the deceased. This is testimonial [direct] evidence; it involves only a testimonial [direct] inference. But when a witness, in the same case, testifies that the accused offered him money as an inducement to absent himself from the trial, the evidence, although based on testimony and involving a testimonial [direct] inference, is circumstantial, for in order to reach a conclusion of guilt it becomes necessary to draw another inference of a *different* kind, namely an

> inference from the attempt to bribe to a consciousness of guilt, which in turn is used as the basis for an inference of guilt.

Fisch on New York Evidence, Section 161 (2d Edition).

That the "direct evidence" pointed out by the trial court in denying appellant's CPL §330.30 motion was actually circumstantial in nature is self-evident. For instance, even if it is assumed that appellant made the statement attributed to him -- "Are we going to take this shit?" -- that comment was not direct evidence showing John Reynolds caused the death of Kevin King. As appellate counsel pointed out during argument of the motion below:

> You can take that any way you want but [there are] three ways to manifest not taking this shit, Your Honor, and one way is to get out of there so you don't have to take this shit anymore. Number two is to say something back so that I'm not taking this shit, I'm giving it back to you. Third way is to kick the shit out of someone. *There [are] three ways to do it and I submit to you that it requires an inference to figure out which way. And that's why the circumstantial evidence rule was necessary and something should have been given to them* (emphasis added) [1753].

The same common sense argument demonstrates that testimony to the effect that John Reynolds was the first of ten people to go out the restaurant door provides no direct evidence that he caused Kevin King's death, recklessly or otherwise. The only way such testimony has any bearing on appellant's involvement in King's death is by way of inference; the mere fact of his leaving first means nothing standing alone. Only when the trier of fact infers John Reynolds' intent or purpose in leaving the restaurant can the link to

causation be made. A perfect illustration of this fact is the trial court's own need to characterize appellant as "leading the charge" outside. The court inferred from appellant's alleged physical conduct that he was somehow acting as a "ringleader" of the attack on Kevin King. Moreover, even such an inference could not establish causation without the benefit of the further inference that, in "leading the charge," John Reynolds was aware of and consciously disregarded a substantial risk that his conduct would cause the death of King.

In erroneously concluding that the jury was presented with a mixture of direct and circumstantial evidence, the trial court failed to address the merits of appellant's argument that a moral certainty charge was an absolute necessity in this case and that its omission constituted grievous error mandating that the verdict be set aside and a new trial granted. That such a charge should have been given cannot be gainsaid. As evidenced by the factual summary above, the proposition that John Reynolds caused Kevin King's death is supported by nothing but conjecture and inference. The prosecution's painstaking presentation of evidence did not reveal a single witness who could honestly say that appellant ever laid a hand on King. Not one person saw appellant punch, kick or strike anyone during the entire evening at the East Side Pizzeria. Of all the witnesses who saw a group of people kicking and punching Kevin King, not a single person could identify John Reynolds as one of the people attacking King. Indeed, to the contrary, prosecution witness Pam Brochu established conclusively that appellant was not in the group attacking King. She testified that she saw five people in that group and identified them as Kerrie Haggerty, Brian Mooney, Shawn Appleby, Shane Appleby and Matthew Sweatland [1369]. Furthermore, at no time did any witness hear appellant exhort or encourage anyone to fight and appellant was never seen aiding any other person in a fight.

The need for an instruction concerning the proper evaluation of circumstantial proof and the permissible manner in which inferences may be drawn is plain and the failure to so charge the jury constitutes reversible error. Indeed, in People v. Sanchez, 61 N.Y.2d 1022, 475 N.Y.S.2d 376 (1984), the Court of Appeals reversed a murder conviction because the trial court refused defendant's request for a "total circumstantial charge" based upon the defendant's statement that he was present at the victim's apartment on the night of the murder and hit her twice after she made offensive remarks to him. The Court of Appeals advised that the defendant's statements constituted "circumstantial," rather than direct, evidence of guilt since the decedent was strangled by a telephone wire:

> Respondent's statements constituted circumstantial, not direct evidence of guilt. Since the case was submitted to the jury on the theory that the cause of death was strangulation by a telephone wire, the key issue for the jury's determination was the identity of the strangler. Respondent's statements may have proved his presence at the scene of the crime close in time to its commission, but the fact of his presence did not establish that he was the strangler. While it may at times be appropriate to leave to the jury the question whether an admission is direct or circumstantial evidence (cf., People v. Rumble, 45 N.Y.2d 879, 410 N.Y.S.2d 806), such deference is inappropriate where, as here, the admission cannot be interpreted to establish the act charged. Thus, the evidence against respondent was entirely circumstantial and the trial court erred in refusing to so instruct the jury.

Id. at 1023, 475 N.Y.S.2d at 377.

Similarly, the prosecution's efforts to pin culpability for Kevin King's demise on John Reynolds simply on the basis of statements attributed to him and his mere presence in the vicinity of the fight mandated the giving of such instructions in the instant case. Witness observations established only that appellant was present at the crime scene. This Court, however, has made clear that proof of presence alone is circumstantial evidence requiring application of the moral certainty standard. People v. Mickewitz, 236 A.D.2d 793, 654 N.Y.S.2d 221 (1997). In Mickewitz, this Court held that a circumstantial evidence charge was mandated because, while the proof at trial showed that the defendant and his cousin were in the truck from which a fatal shot was fired, there was no proof that the defendant fired the shot or held the shotgun:

> The prosecution's case rested only upon direct evidence of the collateral facts that defendant and his cousin were in the truck from which the fatal shot was fired and that the barrel of the shotgun was sticking out of the window on the driver's side. There was no proof, however, that defendant fired the shotgun or even that he, rather than the passenger, was holding the shotgun. Thus, because the evidence of defendant's guilt was entirely circumstantial, the failure of the trial court to instruct the jury that it must apply the moral certainty standard of proof may not be deemed harmless.

Id. at 793, 654 N.Y.S.2d at 222.

The Reynolds' jury was also allowed to consider whether appellant's guilt had been proven under a shared intent theory (Penal Law §20.00) [1554–57]. In short, the jury could find guilt if it concluded beyond a reasonable doubt that John Reynolds (1) shared the mental state required to commit the crime [in this case,

recklessness], and (2) solicited, commanded, importuned or intentionally aided the others in committing the conduct alleged to constitute the crime.

In People v. Comfort, 113 A.D.2d 420, 496 N.Y.S.2d 857 (1985), this Court conclusively established that the circumstantial evidence rule must be followed even where the theory of prosecution is based upon "shared intent". In that case, Larry Comfort told his brother, Joseph, to grab a gun and come with him in a car because he felt that they were being followed and possibly would be killed by drug dealers, who were actually undercover officers. The Comforts' car was subsequently rammed by the car driven by the undercover officers and Joseph shot at the officers, killing one and critically wounding the other.

The Comfort indictment charged the defendants with murder and attempted murder under the theory that they were "intentionally aiding and being aided by each other". The Fourth Department ruled that the circumstantial evidence rule was applicable even though defendant Larry Comfort was charged under the shared intent theory:

> Without adequate proof of shared intent with the principal actor, there is no basis for finding that Larry acted in concert with Joseph, the actual killer (see, People v. McLean, 107 A.D.2d 167, 169, 485 N.Y.S.2d 1019). In addition, where a defendant's conviction is based entirely upon circumstantial evidence, as here, the facts from which the inference of his guilt is drawn must exclude to a moral certainty every reasonable hypothesis of innocence (People v. Marin, 65 N.Y.2d 741, 742, 492 N.Y.S.2d 16, 481 N.E.2d 556). No proof was presented that excluded to a moral certainty the inference that Joseph spontaneously formed the

> decision to fire the gun or that Larry ever knew of his brother's intention to kill Van Hall and Gorenflo. In the absence of such proof Joseph's homicidal intent should not be imputed to Larry (see, People v. Bray, 99 A.D.2d 470, 470 N.Y.S.2d 50). Neither was there any evidence that demonstrated that Larry had a separate, specific intent to kill the investigators.

Id. at 860.

It is important to note that this Court held that the case was entirely circumstantial against defendant Larry Comfort even though he told Joseph to "Grab the gun and come with me . . . the Cubans are going to kill me", and earlier in the day had asked Joseph to get his shotgun and put it in the car they were then using. Id. at 859. Like the statements in the instant case, those statements were "circumstantial", rather than "direct", evidence of the crime charged.

Significantly, this Court also ruled that despite Larry's insistence that Joseph bring a weapon, there was not sufficient evidence that he shared with his brother an intent to kill the car's occupants:

> Larry's behavior in insisting that they drive into the night armed with a shotgun does not establish beyond a reasonable doubt an intent to kill the Plymouth's occupants nor was there any proof of an agreement or common design between the brothers to kill them. The record is consistent with a spontaneous, independent decision by Joseph to shoot the undercover officers (see, People v. Summerset, 100 A.D.2d 947, 474 N.Y.S.2d 838). The defendants left Camille's house for the avowed

> purpose of discovering if Otero and Blanco were connected with the Plymouth. The act of driving around Corning with a shotgun is not inconsistent with that objective and does not prove an intent to hunt down and kill the investigators.

Id. In the instant case, appellant's alleged comment inside the restaurant, "Are you going to take that shit?", his possibly walking out the door first and his presence near the people who were beating Kevin King certainly does not establish, beyond a reasonable doubt and to a moral certainty, that he shared an intent to kick the decedent while he was on the ground, thereby recklessly creating a risk of his death. The People simply did not present proof which excluded to a moral certainty the inference that the person or persons who kicked King while he was lying on the ground spontaneously and independently formed their decision to engage in such behavior. In the absence of such proof, a shared intent cannot be imputed to John Reynolds. Unfortunately, the Court's refusal to charge the moral certainty standard of proof prevented the jury from applying the correct legal standard and denied appellant a fair trial. Further exacerbating this deprivation of fundamental trial protections is the fact that, in an entirely circumstantial case, the trial court not only refused to charge the appropriate moral certainty standard, but also failed to give even the standard definition of circumstantial evidence. This left the jury ignorant of the most basic understandings necessary for a fair and reasoned deliberation on the proof presented.

Given the dearth of any direct evidence establishing John Reynolds' guilt, the court's refusal to charge the jury that it must find that appellant's guilt was proven to a moral certainty to the exclusion of all other reasonable hypothesis of innocence constitutes reversible error which cannot be deemed harmless. As this Court warned in People v. Mickewitz, supra, "[h]armless error analysis is inapplicable where the 'jury could not have known of its duty to

apply the circumstantial evidence standard to the prosecution's entire case'" (People v. Mickewitz, 236 A.D.2d 793, 654 N.Y.S.2d 221, 222, quoting People v. Sanchez, supra at 1023, 476 N.Y.S.2d 376). Harmless error review is particularly inappropriate in the case at bar, where the jurors deciding John Reynolds' fate were not even instructed on what circumstantial evidence was, much less told to apply the moral certainty standard of review.

Accordingly, appellant respectfully requests that the Court reverse the judgment of conviction and order a new trial.

## POINT II

## THE TRIAL COURT VIOLATED CPL §270.35 AND DENIED APPELLANT HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO BE PRESENT AT ALL CRITICAL STAGES OF THE TRIAL BY DISCHARGING A SWORN JUROR WITHOUT CONDUCTING THE PROBING INQUIRY REQUIRED BY LAW AND BY MEETING WITH THE JUROR IN THE ABSENCE OF BOTH APPELLANT AND HIS ATTORNEY

The Court of Appeals long ago prescribed the proper procedure to be followed in discharging a sworn juror. People v. Buford, 69 N.Y.2d 290, 514 N.Y.S.2d 191 (1987). This procedure is intended to protect the defendant's constitutional right to trial by a legally constituted jury in whose selection the defendant has had a voice. People v. Ivery, 96 A.D.2d 712, 465 N.Y.S.2d 371. To that end, when confronted with a potentially unqualified sitting juror, the trial court "must question each allegedly unqualified juror individually *in camera* in the presence of the attorneys and defendant." People v. Buford, supra at 299, 514 N.Y.S.2d at 195-96 (emphasis added). This questioning must probe the juror's ability to render an impartial verdict and counsel should be

permitted to participate in the inquiry. Id. The court must then place the reasons for its ruling on the record. Id. Reversal is required in the instant case because the Cattaraugus County Court failed to abide by this process when discharging a sworn juror during trial.

In the middle of trial it was brought to the trial court's attention that there was a problem involving one of the jurors. During a recess, the court called the attorneys from both sides and appellant into his chambers where they heard Cattaraugus District Attorney's Office Investigator Stouffer explain that, as he entered the building earlier that morning, an old acquaintance of his by the name of Timothy Donovan approached him with an envelope. Inside the envelope was a note asking Stouffer to intervene on his behalf on a speeding ticket by taking the enclosed letter to Assistant Cattaraugus District Attorney Leo Murphy and pleading Donovan's case. Mr. Donovan was Juror No. 5 [1059–62].

The prosecutor recommended that the court have Investigator Stouffer give the letter back to Juror Donovan and advise him that because Donovan was on the jury he could not get involved in the situation. Defense counsel took the opposite view, requesting that the juror be removed because an appearance of impropriety had been created and, further, because counsel was concerned that the juror had not disclosed his relationship with Investigator Stouffer during jury selection [1062–64].

The court concluded that it had to discharge Juror Donovan and seat the first alternate. While the prosecutor did bring the requirements of CPL §270.35 to the court's attention, the court decided not to conduct the required probing inquiry of the juror's fitness to remain on the jury. Instead, the court told the attorneys and appellant to leave chambers and then had Juror Donovan brought in. Far from conducting any inquiry, the court simply told Juror Donovan that "the defense, as you can imagine, has some

concerns, you know, about that and they are afraid and they have asked that I take you off the jury and I think under the circumstances, I don't really have much choice." They then engaged some small talk [1064-74]. No findings were put on the record.

The Cattaraugus County Court's actions were a gross violation of both CPL §270.35 and appellant's right to be present at all critical stages of the proceeding. In Buford, the Court of Appeals made it unmistakably clear that not only must the juror be questioned as to his ability to act as a fair and impartial juror, but that this inquiry must be done in the presence of the defendant and his counsel. This comports with New York's long held recognition that criminal defendants have a fundamental due process right to be present with counsel at all material stages of a trial (see, CPL §260.20; People v. Turaine, 78 N.Y.2d 871, 573 N.Y.S.2d 64; People v. Mehmedi, 69 N.Y.2d 759, 513 N.Y.S.2d 100). The United States Supreme Court has recognized that a defendant's absence from material stages of a criminal proceeding may impair his ability to defend himself (Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 332).

The process utilized by the trial court was constitutionally deficient in two important ways. First, a sworn juror was removed without any inquiry into whether the particular circumstances would render him an unfair or partial juror. It may very well have been the case that once all involved heard what Juror Donovan had to say there may have been agreement that he was fit to continue as a juror, thereby obviating the need to discharge a juror in whose selection appellant had participated. Second, the exclusion of appellant and his attorney from the in chambers discussion between the Judge and Juror Donovan deprived appellant of the right to make his own assessment of the juror's demeanor and motivations (see, People v. Sloan, 79 N.Y.2d 386, 583 N.Y.S.2d 176 [1992]). Significantly, this opportunity would not have been a meaningless

exercise in this case because appellant himself had serious concerns -- which he expressed to the court -- about a juror who was sleeping during the presentation of proof. Coincidentally, this juror happened to be the first alternate, who was seated in Juror Donovan's place [1063–70, 1075]. Had appellant been afforded his right to be present during the court's meeting with Juror Donovan, he would have been able to make an informed decision as to whether he wanted Donovan to be removed in favor of someone who might not give the requisite attention to the proof as it came in.

The Cattaraugus County Court ignored processes designed to protect appellant's rights under Article I, Section 2 of the New York State Constitution and deprived appellant of his right to be present at a critical stage of the trial. Accordingly, appellant's conviction must be reversed and a new trial ordered.

## POINT III

## THE TRIAL COURT ERRED IN REFUSING TO RECUSE ITSELF FROM APPELLANT'S §330.30 MOTION HEARING

On September 19, 1997, prior to imposition of sentence but post-verdict, juror Denise Luce hand delivered to the court a letter which reflected her experience as a juror in appellant's case [1664].

On that same date, the court met with juror Luce outside the presence of appellant and counsel. During the 45-minute, off-the-record meeting between the court and juror Luce, Luce related to the court her experiences as a juror, including the harassment and extreme pressure she was forced to undergo from other jurors. Ms. Luce explained to the court that she did not believe that there was sufficient evidence to convict appellant but only changed her vote due to the harassment and pressure from fellow jurors [1719, 1820]. In her sworn affidavit, Ms. Luce states

that she also "discussed several aspects of the case and jury deliberations" with Judge Himelein [1661]. She further stated that during jury deliberations, two jurors from the Olean area brought into the jury room extra record information which was crucial in determining material issues at appellant's trial. Specifically, the Olean jurors described the lighting in the area of the crime scene and also stated that they could more accurately describe the size and layout of the restaurant than the photographs which were offered as evidence [1659-60].

Pursuant to CPL §§ 330.30 and 330.40, appellant filed a motion requesting, *inter alia*, that the trial court recuse itself from appellant's case based upon the improper meeting between the court and juror Luce. Given that Ms. Luce was obviously a critical witness to the juror misconduct and that it is impossible for appellant to completely reconstruct the meeting between the court and Luce, since the court failed to have a stenographer present to record the meeting, Judge Himelein became a necessary witness. As such, the denial of appellant's request for recusal was erroneous for a number of reasons.

In the first instance, appellant attempted to call the trial court as a witness with respect to the various statements made by juror Luce during their 45-minute meeting [1736-43]. In People v. Rodriguez, 14 A.D.2d 917, 221 N.Y.S.2d 532, 533-534 (2d Dept. 19961), the Second Department recognized that:

> There is no dispute as to the well-established rule that where a judge is a material witness, he should disqualify himself (People v. Amooro, 8 A.D.2d 683, 184 N.Y.S.2d 383; People, or Complaint of Watkins v. Lennan, 706 App.Div. 266, 268, 200 N.Y.S. 510). The claim, however, that the judge is a material witness must be made in good faith and

must be based on fact (United States v. Halley, 2 Cir., 240 F.2d 418).

In the instant case, the trial court met with juror Luce two days after the jury rendered its verdict and was obviously a witness to her statements regarding jury misconduct. Additionally, the failure of the trial court to have a stenographic record of the meeting may have increased appellant's need to call the court as a witness to testify to juror Luce's statements for purposes of either establishing or impeaching her credibility concerning the various topics she discussed. As such, the claim that the trial court was a material witness was made in good faith and based on factual circumstances.

Secondly, due to the improper meeting between the court and juror Luce, the court had the ability to dispute Luce's testimony at appellant's §330 hearing based upon her off-the-record statements at the September 19, 1997 meeting with the court. Any perceived conflicts in her testimony could cast doubt upon her credibility resulting in the court, whether consciously or subconsciously, impeaching Luce's testimony at the hearing or relying upon what she said before rather than in open court.

Additionally, based upon the court's off-the-record meeting, Judge Himelein may have already formulated a determination of Luce's veracity on the merits of her claims of juror misconduct. Specifically, prior to Luce's testimony at appellant's §330 hearing, the trial court had observed her demeanor and presumably developed an opinion about her honesty and credibility. Moreover, the trial court was required to pass upon not only Luce's credibility but also the accuracy of her recollection. Against this backdrop, recusal was necessary. The trial court had significant exposure to the substance of juror Luce's anticipated testimony by virtue of a 45-minute *ex parte* conversation with her during which juror Luce divulged extensive information material to the basis of appellant's §330 motion. Realistically, it must be acknowledged that during the

process of weighing juror Luce's testimony about events during jury deliberations, the court naturally assessed her hearing testimony against its own personal recollection of what juror Luce said during the extensive -- and off-the-record -- discussions of the same issues in chambers. Severe prejudice was caused to appellant given that the court naturally could not help but be influenced in its valuation of juror Luce's testimony by its own memories of a detailed private conversation with her about the very same subject matters, all in the absence of retained counsel. The trial court's assessment of juror Luce's testimony was likely swayed by one or more of the following potential factors:

(a) The addition of information concerning jury deliberations not previously disclosed by juror Luce during the *ex parte* meeting with the court;

(b) The omission from her hearing testimony of relevant information previously disclosed by juror Luce to the court during the unrecorded *in camera* meeting;

(c) Any court-perceived deviation from her previous description of events in the deliberation room;

(d) Any misapprehension by the court as to what juror Luce said during the lengthy meeting with the court; and/or

(e) Any court-perceived difference between juror Luce's demeanor during hearing testimony about various events and her demeanor during the court's personal discussions with her about these very issues

(i.e., a noticeable change in gravity or ardency concerning particular issues).

Consequently, the trial court became an unsworn witness whose undisclosed recollection potentially or in fact had a substantial impact on the weight which was accorded to juror Luce's testimony, wholly unbeknownst to appellant. Moreover, the trial court based its denial of appellant's §330 motion almost solely on the credibility, or lack thereof, of Luce and four other witnesses [2049]. Appellant was left without recourse to use cross-examination or any other tool which may have mitigated or eliminated any prejudice stemming from the influence of any differences between juror Luce's hearing testimony and her prior *ex parte* statements to the court. Appellant is still unaware what extra-judicial information the trial court relied upon in consideration of juror Luce's testimony. Further, appellant was denied any opportunity to effectively address the prejudicial impact of the interplay of seemingly improper influences during the court's deliberative process.

Additionally, the failure of the trial court to recuse itself based upon the court's correspondence with Ms. Rae Coletti, appellant's aunt, was erroneous.

Appellant requested also that the court recuse itself for the purposes of eluding any appearance of impropriety, bias or prejudice resulting from the trial court's extra judicial statements made to Ms. Rae Coletti. Two letters were drafted by the court to appellant's aunt, Ms. Rae Coletti, wherein the court made specific comments with regard to: the court's own opinion of the facts; choice of counsel issues; the upcoming sentencing; and the plea which appellant chose not to take [1724-28].

More specifically, by letter dated October 21, 1997 to Ms. Coletti, the court wrote:

> There was no "awareness" on my part that John Reynolds was innocent according to the evidence. . . . Two people testified that Mr. Reynolds led the charge outside, two people testified that Mr. Reynolds was in the pile of people that were hitting and kicking Kevin King, and Mr. Reynolds ran away when learning that the police were called. Section 20 applies virtually every time more than one person participates in an event. The defense did not seriously challenge that.

[1724-25]. Significantly, the court has mistakenly set forth the law of accessorial liability for the conduct of another. Section 20.00 of the Penal Law, entitled "Criminal liability for the conduct of another," states:

> When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

N.Y. Penal Law §20.00 (McKinney 1987). Notably absent from the court's letter is the fact that an accused must share the mental culpability of the actor when engaging in such conduct. Instead, the court made the blanket statement that "Section 20 applies virtually every time more than one person participates in an event" [1724].

Further, by letter dated November 13, 1997, the court once again corresponded with Ms. Coletti. The court wrote:

> Even if it is true that one or two jurors regret their decision, that does not alter the fact that ten or eleven of them were quite comfortable with it. That does not exactly bode well for your nephew if another trial was required somewhere down the road. . . . My recollection is that two people placed your nephew in the pile that was hitting and kicking Kevin King. . . . These days, every time someone is convicted, the first thing they do is blame their lawyer. Your nephew initially hired Tom Brady and was apparently unhappy with his advice or recommendation with respect to the plea offer. . . . Now, you appear to be blaming Mr. Elmore for your nephew's predicament and yet another lawyer has been hired. I don't mean to be offensive but I see this frequently; people always want to blame someone else instead of accepting responsibility for what they do and blaming one's lawyer is commonplace among convicted defendants these days (emphasis added).

[1726-27]. The court is clearly condemning Mr. Reynolds for both exercising his right to counsel of his choosing, and for allegedly "blaming" his attorneys. With respect to the plea bargain, the court stated:

> [T]he offer was a plea to Criminally Negligent Homicide and a misdemeanor DWI and the sentence was negotiated to be one year in the County Jail and that's what would have been imposed. I felt then that he should have taken it. . . . Of course I will consider your comments when I sentence your nephew. . . . However, keep in mind that Kevin King had relatives too and no matter what happens to any of the people that were

> responsible for his death, they will get out of jail someday and resume their lives. Kevin King will not resume his (emphasis added).

[1727-28].

The Code of Judicial Conduct requires a Judge's recusal when his or her "impartiality might reasonably be questioned" (22 N.Y.C.R.R. §100.3[c][1]). Absent a legal disqualification, however (see, e.g., Judiciary Law §14), the Judge is generally the sole arbiter of recusal (People v. Moreno, 70 N.Y.2d 403, 405, 521 N.Y.S.2d 663; see also, People v. Smith, 63 N.Y.2d 41, 68, 479 N.Y.S.2d 706 [noting that recusal is generally "a matter of personal conscience"]). Accordingly, while Judges should strive to avoid even the appearance of partiality, the "better practice" would be to err on the side of recusal in close cases (see, Corradino v. Corradino, 48 N.Y.2d 894, 895, 424 N.Y.S.2d 886).

In that respect, it is beyond dispute that the ability to be impartial is an indispensable requirement for a judicial officer. Sardino v. State Com'n on Judicial Conduct, 58 N.Y.2d 286, 461 N.Y.S.2d 229 (1983). Equally important is the requirement that a Judge conduct himself in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property. Sardino, supra, 461 N.Y.S.2d at 231, citing, Matter of Steinberg, 51 N.Y.2d 74, 431 N.Y.S.2d 704.

Moreover, the Code of Judicial Conduct [Title 22, §100.3], sets forth the regulations which govern judicial duties of a judge. Specifically, §100.3(6) states:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law, a

> judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding.

Title 22, N.Y.C.R.R. §100.3(6) (1997) (emphasis added).

Clearly, here, the court violated these requirements when it engaged in detailed correspondence with Ms. Coletti about appellant's pending case, and offered its opinion with respect to substantive matters. As a result, there is a strong appearance of partiality and bias held by the trial court.

In People v. Greenfield Construction Co., Inc., 48 A.D.2d 765, 368 N.Y.S.2d 89 (4th Dept. 1975), this Court admonished such statements made by the lower court:

> It is regrettable that the County Judge presiding in this prosecution has made various comments about the determination of the Grand Jury which cast doubt upon his impartiality. His statement "that something was obviously done improperly" gives one the impression that he may have prejudged certain aspects of this case. No good purpose is served by such comments by a judge, either in his opinion or to the media, during the pendency of an action.

368 N.Y.S.2d at 90 (emphasis added). Moreover, with regard to judicial restraint, this Court stated:

> The desire for publicity is a tempting tonic which no jurist should imbibe. Judicial restraint should be exercised at all stages of a prosecution to insure all

> parties of their constitutional right to a fair trial. The interests of justice require that all future proceedings in the case at bar be assigned to a County Judge other than the one who has presided to this date.

Id. (emphasis added).

The comments made by the trial court cast a dark cloud over its ability to act as an impartial arbitrator as the law requires. The court's comments to Ms. Coletti (i.e., "That does not exactly bode well for your nephew if another trial was required somewhere down the road"), has raised profound questions with respect to the court's appearance of impartiality.

The court cannot claim that its ability to act impartial towards appellant was not effected, despite its extra judicial comments to Ms. Coletti. This claim would be erroneous. In Sardino, supra, 461 N.Y.S.2d at 231, the petitioner (judge) conceded that his remarks were "excessive" but denied that he felt any bias against the defendants or that his action at the arraignments were actually motivated by animosity. In response, the Court of Appeals stated:

> If, as petitioner contends, he did not actually harbor any bias his course of conduct and concededly excessive statements could only create the impression in the mind of the public that he was predisposed against those defendants who appeared before him if not defendants generally.

Sardino, 58 N.Y.2d at 291, 461 N.Y.S.2d at 231. Further, the court noted that:

> The record of the court proceedings also shows that petitioner also assumed an adversarial role at arraignments by questioning the defendants about the crime charged, occasionally eliciting incriminating statements and, in other cases, expressing disbelief when the defendants, their attorneys, or family members, maintained their innocence. On these occasions, in addition to treating the accusation as proved, the petitioner stated his views in sarcastic terms and displayed his animosity against the accused by resort to name-calling and dehumanizing remarks.

Id. Similarly, the trial court made comments such as; "[T]hese days, every time someone is convicted, the first thing they do is blame their lawyer," and "[Y]our nephew initially hired Tom Brady and was apparently unhappy with his advice or recommendation with respect to the plea offer"; and "Now, you appear to be blaming Mr. Elmore for your nephew's predicament and yet another lawyer has been hired. I don't mean to be offensive but I see this frequently; people always want to blame someone else instead of accepting responsibility for what they do and blaming one's lawyer is commonplace among convicted defendants these days." Clearly, these types of comments are not permissible.

Appellant respectfully submits that for all of the aforementioned reasons, the trial court committed reversible error in failing to recuse itself from appellant's §330 hearing and respectfully requests that this Court reverse his judgment of conviction.

## POINT IV

## JUROR MISCONDUCT DURING DELIBERATIONS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL

Pursuant to CPL §§ 330.30 and 330.40, appellant filed a motion requesting, *inter alia*, a new trial based n numerous instances of juror misconduct. The trial court erroneously denied appellant's motion, stating that appellant failed to establish that the jury relied on extra record information during deliberations [2045]. Appellant through sworn affidavits and testimony, conclusively established that due to juror misconduct the jury, whether subconsciously or consciously, relied upon information which was not introduced at trial and where extra record information comes into the possession of the jury, the defendant is "presumptively prejudiced" and the People have the burden of making an affirmative showing that it was harmless. People v. Edgerton, 115 A.D.2d 257, 495, N.Y.S.2d 858 (4th Dept. 1985). At appellant's §330 hearing the People utterly failed to demonstrate that the extra record information that was injected into the jury room was harmless.

Immediately following the commencement of deliberations, the jurors were divided into a group of ten who believed that appellant was guilty and two jurors -- namely, jurors Luce and Painter -- who believed that the evidence was not sufficient to support a guilty verdict. In their sworn affidavits, jurors Denise Luce and Ruth Painter describe the deliberation process as being rife with harassment and vicious arguments. Jurors Luce and Painter also describe various other instances of juror misconduct [1658-1663].

During deliberations, Luce requested readbacks which caused other jurors to throw up their arms in protest and turn away or to simply ignore her. On numerous occasions, the treatment

Luce received from fellow jurors reduced her to tears [1658]. On the second day of deliberations, even though Luce and Painter repeatedly and consistently stated that they would vote not guilty because there was insufficient evidence, the remaining jurors responded that they would not break and would work through dinner in order to get a conviction. Further, after a guilty verdict had been voted upon and the jurors were preparing to enter the courtroom to announce the verdict, a female juror whom Luce believed to be either Juror #2 or #3 stated to Luce that if she responds "not guilty" when questioned by the judge, the jurors would not return to engage in further deliberations with her [1658-59]. Further, there was at least one incident during deliberations when Luce heard a juror comment upon appellant's failure to take the stand during the trial. Specifically, a juror made a comment that appellant would not even get on the witness stand in his own defense [1659, 1820, 1914-15].

Moreover, both jurors Luce and Painter recount numerous instances when jurors injected their own personal knowledge of the crime scene into the deliberations in order to discount the arguments set forth by Luce and Painter. Juror Denise Luce recalled that Juror #12 was a pregnant white female in her thirties and Juror #4 or #5 was a white male in his early to middle forties who were both from the Olean area. Luce and Painter both recalled that the aforementioned jurors stated that not only were they from the Olean area but that they were very familiar with the crime scene, including the restaurant, parking lot areas, and the lighting conditions [1659-60, 1662-63].

During deliberations, Luce and Painter repeatedly argued that the testimony with respect to the individuals who were involved in the altercation in the parking lot was insufficient based on the fact that the incident occurred at night and the lack of lighting in the area would have prevented witnesses from specifically identifying appellant [1659-60, 1662, 1820-21, 1912]. In response, the Olean jurors informed Luce and Painter that they were both familiar with

the parking lot area and that it was all very well lit at night. In fact, these same jurors stated that they knew exactly where the lights were located and pointed out these locations on photographs and scale drawings of the parking lot area which had been previously entered into evidence [1660, 1662, 1822-25, 1904-06]. Further, Luce and Painter argued that it was unusual that Pam Brochu claimed to have heard appellant state, "Are you going to take this shit?" from across the restaurant because the restaurant seemed to be large and there were numerous patrons engaging in separate conversations. The jurors from Olean responded that they had both been to the restaurant and that it had formerly been a pizza parlor and was not as big as the photographs made it appear [1660, 1662-63, 1830-32]. The Olean jurors also stated that tables inside the restaurant are actually set up different than how they appear in the photographs [1822, 1824-25, 1831-32]. At trial, there was no evidence offered as to the exact position of the lights in the parking lot area nor was any evidence offered as to the illumination of the lights. Further, photographs of the inside of the restaurant were offered into evidence at appellant's trial; however, the fact that it was previously a pizza parlor, that the photographs made the restaurant look larger than it actually is, and that the tables inside the restaurant are set up differently than how they appear in the photographs was not evidence which the jury was permitted to consider.

Additionally, Juror #12 informed the rest of the jury that she went to church with appellant's sister and that appellant's group, which she called the "Portville Boys," are good boys from good families, well-educated, and should have known better than to get into the fight [1660, 1663, 1833-34]. Further, Juror #12 stated that it was going to be hard to face appellant's family at church [1721].

The two Olean jurors unquestionably became unsworn witnesses against appellant by injecting extra record facts into the jury deliberations, thereby violating appellant's Sixth Amendment right to a "fair trial, by an impartial jury . . . and [to] be confronted

with the witnesses against him . . . ." U.S. Const. Amend. VI. This Court has specifically held that extra record facts cannot be introduced into deliberations by a juror because the juror necessarily becomes an unsworn witness who the defendant cannot confront or cross-examine:

> Although generally a verdict may not be impeached by delving into the deliberations of the jury, whenever, through the introduction of significant extra record facts, a juror becomes an unsworn witness testifying to critical information without defendant being afforded his right of confrontation or cross-examination guaranteed by the Sixth Amendment, the constitutional rights take precedence over New York's policy against impeachment of jury verdicts.

People v. Edgerton, 115 A.D.2d 257, 495 N.Y.S.2d 858, 859 (4th Dept. 1985). The Edgerton Court expressly recognized that it is irrelevant that the extra record facts come from a juror rather than from a stranger:

> The circumstance that extra record facts come from a juror rather than from a stranger to the jury is immaterial. "[i]t is the 'nature of the matter and its probable effect on a hypothetical average jury,' not the source of information or the locus of its communication, which determines whether the defendant has been prejudiced" (United States ex rel Owen v. McMann, 2d Cir., 435 F.2d 813, 820, cert. denied, 402 U.S. 906, 91 S.Ct. 1373, 28 L.Ed.2d 646). The Second Circuit affirmed the grant of habeas corpus relief in Owen on the ground that defendant was denied a fair trial because, during the course of deliberations, three jurors

> informed other jurors that they knew about the defendant and referred to unfavorable events in his life which were unrelated to the charge, including allegations concerning two specific incidents which had not been and probably could not have been received in evidence, and which the defendant had no opportunity to refute.

Id. While the Olean jurors may have been well intentioned when they introduced the extra record facts, the Court of Appeals has advised that even well-intentioned jury conduct may violate the defendant's right to a fair trial:

> Improper influence, of course, embraces not merely corrupt attempts to effect the jury process, but even well-intentioned jury conduct which tends to put the jury in the possession of evidence not introduced at trial.

People v. Brown, 48 N.Y.2d 388, 393, 423 N.Y.S.2d 461, 463 (1979).

In People v. Huntley, 87 A.D.2d 488, 452 N.Y.S.2d 952 (4th Dept. 1992), a juror lied to fellow jurors by claiming that he had visited the crime scene and made findings which undercut the credibility of the defendant. Regardless of the fact that the juror had not actually visited the crime scene, this Court stressed that the hazards associated with the infiltration of extra record information, even if false, necessitates a new trial:

> The point, however, is that such deliberations must take their content from the record facts before them, not from external facts brought into the jury room by a juror and thus not screened through the judicial process. When that occurs there is "such a

> probability that prejudice will result that [the verdict] is deemed inherently lacking in due process" (Estes v. Texas, 381 U.S. 532, 542-43, 85 S.Ct. 1628, 1632-33). Because the information communicated to the jury here was of such nature, defendant was deprived of his constitutional right to due process and must be granted a new trial.

People v. Huntley, 87 A.D.2d 488 at 490, 452 N.Y.S.2d 952, 955-56 (4th Dept. 1992). Appellant concedes that the mere fact of infiltration of some molecules of extra record matter does not compel reversal. However, it is the nature of the facts communicated which determine the likelihood of prejudice. People v. Edgerton, 115 A.D.2d 257, 495 N.Y.S.2d 858 (4th Dept. 1985). In the instant case, the jury deliberations were largely shaped by the external facts brought into the jury room by the Olean jurors, causing severe prejudice to appellant.

Furthermore, the extra record facts in the instant case were introduced for the express purpose of countering the arguments relied upon by jurors Luce and Painter, who believed that the evidence was insufficient. Moreover, the extra record information specifically dealt with issues that were critical to appellant's case. See, People v. Thomas, 184 A.D.2d 1069, 584 N.Y.S.2d 706 (4th Dept. 1992) [jury foreman improperly conducted independent research into the effects of cocaine use and alcohol consumption, and thereby injected extra record information on a material issue into jury deliberations].

In United States ex rel Owen v. McMann, 435 F.2d 813 (2d Cir. 1970), cert. denied, 402 U.S. 906, 91 S.Ct. 1373 (1971), it was discovered that three jurors had informed the others that they had reason to believe, based on extraneous information, that the defendant was guilty. In state court, the defendant's conviction was affirmed without a hearing. Upon filing a federal writ of habeas

corpus, the District Court judge held a hearing and, finding that some of the jurors had been told, both during and trial and deliberations, that the defendant had been in trouble all his life and, in general, was possessed of a bad reputation, warned:

> We cannot expunge from jury deliberations the subjective opinions of jurors, their attitude and expositions, or their philosophies .... Nevertheless, while the jury may leaven its deliberations with its wisdom and experience, in so doing it must not bring extra facts into the jury room. In every criminal case we must endeavor to see that jurors do not [consider] in the confines of the jury room . . . specific facts about the specific defendant then on trial.

Id. at 818 (emphasis in original) (quoting, United States v. McKinney, 429 F.2d 1019, 1022-23 [5th Cir. 1970]). In the instant case, the Olean jurors unquestionably introduced into jury deliberations extra record evidence pertaining to material issues at trial and specific facts about appellant, including: whether the lighting in the parking lot was sufficient to allow for the identification of fight observers and participants; whether the size of the restaurant permitted occupants to hear appellant state, "Are you going to take this shit?"; and the character and education of the "Portville Boys" which held appellant to some higher standard of behavior. Of paramount importance is that appellant was denied the opportunity to cross-examine those jurors who became unsworn witnesses in order to challenge their numerous allegations. Furthermore, at least one juror -- namely, juror Luce -- has clearly indicated that she was influenced by the extra record facts introduced by the Olean jurors. Specifically, she stated that the extra record facts with respect to the lighting in the parking lot and interior dimensions of the restaurant were utilized by fellow jurors to counter her arguments that the proof was not sufficient because there

was not sufficient lighting to identify individuals in the parking lot and that it seemed unusual that Pam Brochu claimed to have heard appellant state, "Are you going to take this shit?" from across the restaurant due to the size and occupancy of the restaurant at that time.

Accordingly, appellant respectfully requests that this Court reverse his judgment of conviction and grant him a new trial based on the aforementioned instances of misconduct during jury deliberations.

## POINT V

## THE SENTENCE IMPOSED ON APPELLANT IS HASH AND EXCESSIVE AND SHOULD BE MODIFIED IN THE INTEREST OF JUSTICE

John Reynolds was sentenced to a minimum of four years and a maximum of twelve years in prison. It is submitted that in light of John's lack of any significant criminal record prior to the instant arrest, his personal background, and the remorse he has shown for the entire situation, the trial court abused its discretion in imposing such a harsh sentence, especially in comparison to other defendants. The sentences of the co-defendants lend great force to the conclusion that John Reynolds was punished for exercising his constitutional right to a trial by jury. The sentences of the co-defendants ranged as follows:

(1) Sandra S. Haggerty - pled guilty to assault in the third degree and was sentenced to sixty (60) days in the Cattaraugus County jail and three (3) years probation.

(2) Kerrie L. Haggerty - pled guilty to assault in the third degree and was sentenced to one (1) year in the Cattaraugus County jail.

(3) Brian E. Mooney - pled guilty to criminally negligent homicide and was sentenced to one year in the Cattaraugus County jail.

(4) Shane Appleby - pled guilty to criminally negligent homicide and was sentenced to an indeterminate term of incarceration of from one and one-third years to a maximum of four (4) years.

(5) Shawn Appleby - pled guilty to manslaughter in the second degree and was sentenced to an indeterminate term of incarceration of from two and one-third years to a maximum of seven years.

(6) Cory Shea - pled guilty to criminally negligent homicide and was sentenced to one (1) year in the Cattaraugus County jail.

(7) Troy A. Fusco - pled guilty to assault in the third degree and was sentenced to sixty (60) days in the Cattaraugus County jail and three (3) years probation.

[2084]. There is ample basis in this record to conclude that John Reynolds' sentence was harsh and excessive.

Shawn Appleby, one of appellant's co-defendants, pled guilty to manslaughter in the second degree, the same crime for which appellant was ultimately convicted. Pursuant to his plea

agreement, Shawn Appleby received an indeterminate sentence of from two and one-third years to a maximum of seven years while appellant, after trial, received an indeterminate sentence of from four to twelve years. Moreover, at appellant's trial, the proof clearly demonstrated that Shawn Appleby was actively involved in the altercation which led to Kevin King's death, while only minimal circumstantial evidence was offered to suggest appellant's involvement in the altercation [908-12, 1097-98, 1099-1103, 1118-20, 1138-39, 1142-44, 1460].

As is his right, appellant has continuously asserted his innocence and should not be penalized for the exercise of his right to a jury trial. People v. Patterson, 106 A.D.2d 520, 483 N.Y.S.2d 55 (2d Dept. 1984), citing, Borden Kirches v. Hayes, 434 U.S. 357, 98 S.Ct. 663 (1978), and People v. Pena, 50 N.Y.2d 400, 429 N.Y.S.2d 410 (1980).

The maxim of People v. Farrar, 52 N.Y.2d 302, 305-306, 437 N.Y.S.2d 961 (1981), remains true today. "The determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence" (citation omitted). These factors were improvidently evaluated in the case at bar.

John came from a large and close-knit family and was always known as a dedicated and loving member of his family [2072-78]. As noted in appellant's sentencing memorandum, numerous letters were submitted on John's behalf attesting to appellant's good character and demonstrating that John is an upstanding member of the community who cares deeply for his family, friends and the community in which he lives [2065-2127]. Moreover, John is genuinely distraught over the fact of Kevin

King's death. At sentencing, John expressed his remorse for Kevin King and the King family [2140-41].

John Reynolds is a young man with great potential for the future. He has the support of a concerned and loving family and there is every reason to believe that he will become an asset to the community while maintaining a law-abiding lifestyle. His connection to this case is based upon paper-thin, circumstantial evidence. Indeed, part of the evidence which the prosecution claims damns John to a conviction shows that he tried to be a peacemaker. Further, no one claims to have observed John to strike a single blow. He, however, has received a harsher sentence than one like Shawn Appleby, who admittedly and unquestionably beat Kevin King.

It is respectfully submitted that the goals of societal protection, rehabilitation and deterrence will be achieved with the imposition of a lesser sentence. See, People v. Sinclair, 231 A.D.2d 926, 647 N.Y.S.2d 897 (4th Dept. 1996) [where this Court reduced defendant's sentence in light of his remorse, numerous letters attesting to defendant's character and prospect for rehabilitation, and his lack of criminal history]. The obvious disparity between appellant's sentence and the sentences received by his co-defendants demonstrates the court's clear failure to exercise judicial discretion. See, People v. Harris, 122 A.D.2d 458, 504 N.Y.S.2d 846 (3d Dept. 1986) [holding that although sentence of one and one-third to four years' imprisonment after conviction upon plea of criminal possession of controlled substance was within statutory limits, it was abuse of discretion as evidenced by disparity between that sentence and those imposed on co-defendants], and People v. Shughart, 247 A.D.2d 826, 668 N.Y.S.2d 836 (4th Dept. 1998) [this Court reduced a defendant's sentence in the interest of justice based on the disparity of the sentence with co-defendants' sentences and defendant's lack of criminal record].

Accordingly, appellant respectfully requests that the Court reduce his sentence in the interest of justice.

## POINT VI

## APPELLANT'S CONVICTION IS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AND IS AGAINST THE WEIGHT OF THE EVIDENCE

Appellate review of legal sufficiency and weight of the evidence is inter-related, but the standards require discrete analysis. People v. Bleakley, 69 N.Y.2d 490, 495 (1987). Legal sufficiency review calls on the court to determine whether the evidence, viewed in the light most favorable to the People, could lead a trier of fact to conclude that each of the elements of the crime had been proven beyond a reasonable doubt. People v. Wong, 81 N.Y.2d 600, 608 (1993); see also, People v. Hawkins-Rusch, 212 A.D.2d 961 (4th Dept. 1995). Where the verdict is based wholly on circumstantial evidence, "for guilt to be proven beyond a reasonable doubt the hypothesis of guilt should flow naturally from the facts proved, and be consistent with them; and the facts proved must exclude 'to a moral certainty' every reasonable hypothesis of innocence." People v. Benzinger, 36 N.Y.2d 29, 32, 364 N.Y.S.2d 855, 856 (1974) (citations omitted).

Even if the reviewing court concludes that the evidence was legally sufficient, where a different verdict would not have been unreasonable the court must "weigh the probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony." People v. Bleakley, 69 N.Y.2d 490, 495 (1987), quoting, People ex rel. MacCracken v. Miller, 291 N.Y. 55, 62 (1943). The appellate court may set aside the verdict if it appears that the trier of fact failed to give the evidence the weight it should have been accorded. People v. Bleakley, supra. Such relief is warranted in the instant

case, where the verdict is not supported by legally sufficient evidence and is also against the weight of the evidence.

Viewed in a most favorable light, the People's proof would not permit any juror to conclude that appellant's guilt had been proven beyond a reasonable doubt. Without belaboring the point, not only was the trial devoid of any proof, direct or circumstantial, establishing that John Reynolds either caused the death of Kevin King himself or importuned others to do so, the prosecution witnesses themselves gave testimony which bolstered appellant's claim of innocence.

As has been firmly established, even viewing the proof in the most favorable light, after presenting eighteen witnesses -- eleven of whom were at the East Side Pizzeria when the events unfolded -- the prosecution demonstrated only four things of note:

(1) That John Reynolds was a patron at the pizzeria on October 22, 1994;

(2) That he may have made a comment to the effect, "Are you going to take that shit?";

(3) That he may have been the first person to walk out the door after Steven Hellwig issued his challenge; and

(4) That appellant may have been in the vicinity of a group of people who were attacking Kevin King.

Even assuming these claims to be true, such proof falls far short of establishing the elements of the crime beyond a reasonable doubt.

Ironically, the balance of the prosecution's evidence actually favored appellant. Pam Brochu conclusively established that John Reynolds was not part of the group punching and kicking Kevin King near the pickup truck [1365, 1369]. Shawn Appleby candidly admitted that he punched King in the mouth so hard that he "crumpled" to the ground and that he did not see John Reynolds punch, kick or strike Kevin King at any time [1097-98, 1117]. Shawn's comments mirrored those of at least ten other prosecution witnesses who swore under oath that they did not see John Reynolds punch, kick or strike King at any time and did not hear him solicit, command, exhort or encourage anyone to fight or hurt Kevin King. Significantly, several of these witnesses -- Bedow, Seeley, Brochu -- were associated with neither group and were in a position to view the fights at length, yet none of them saw appellant throw a single punch or kick at anyone. Even Steven Hellwig, who was beaten along with King and Kevin Kenyon, testified that John was not involved in the fighting [985-86, 1000-01]. The People's best and only evidence against appellant was weak circumstantial proof which was even ambivalent in its weak stage. The evidence, at best, hinted of the tangential involvement of appellant in non-violent activity -- basically, just standing around while the fighting went on. The People would have this Court accept that they introduced at least the slimmest filament of proof necessary to allow the elements of manslaughter in the second degree to be found beyond a reasonable doubt. Appellant submits that, even crediting the most tortured prosecution theories, the evidence set before the jury was woefully insufficient to exclude to a moral certainty every reasonable hypothesis of innocence. People v. Benzinger, supra.

In the event that the Court should find that the verdict was supported by legally sufficient evidence, a compelling case can be made that a different verdict would not have been unreasonable. Thus, appellant would urge the Court to exercise its power to weigh the evidence. People v. Bleakley, supra. Recognizing that such power is exercised in favor of reversal only sparingly, appellant

submits that the circumstances of the instant case provide a myriad of reasons to do exactly that. Here, the People's own proof presents an abundance of reasonable doubt. Because the jury failed to give the evidence the weight it should have been accorded, its verdict should be set aside.

Accordingly, appellant respectfully requests that the Court reverse his conviction and dismiss the indictment.

## CONCLUSION

For all the reasons proffered in this brief, appellant requests that this Court reverse his convictions and dismiss the indictment or, in the alternative, grant a new trial.

DATED: June 17, 1999

Respectfully submitted,

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**KA 99-535**
To be argued by
Diane M. LaVallee, Esq.
Estimated time for argument:
20 Minutes

NEW YORK SUPREME COURT
APPELLATE DIVISION : FOURTH DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK,
*Respondent*,

vs.

JOHN L. REYNOLDS,
*Defendant-Appellant*.

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Cattaraugus Indictment No. 95-168

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# BRIEF FOR RESPONDENT

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

- against - :

JOHN L. REYNOLDS, :

Defendant-Appellant. :

----------x

# RESPONDENT'S BRIEF

## PRELIMINARY STATEMENT

Defendant John L. Reynolds appeals from a January 29, 1999 judgment of the County Court, Cattaraugus County (Himelein, J.). By that judgment, defendant was convicted, following a jury trial, of one count of Manslaughter in the Second Degree (Penal Law § 125.15[1]). He was sentenced on January 29, 1999 to an indeterminate prison term of from four to twelve years. Defendant is currently on bail pursuant to a stay of execution of judgment of conviction, signed on February 1, 1999, by Justice John J. Callahan. The People of the State of New York have been represented throughout this case by members of the New York State Department of Law, cross-designated as Cattaraugus County Assistant District Attorneys.

## INTRODUCTION

In the early morning hours of October 23, 1994, defendant, acting in concert with a group of others, kicked and

beat Kevin King to death in the parking lot of the East Side Pizzeria on State Street in Oleon, New York. For these acts, defendant and seven accomplices were indicted by a Cattaraugus County Grand Jury. Defendants were charged with Murder in the Second Degree (Penal Law § 125.25[2]), Manslaughter in the First Degree (Penal Law § 125.20[l]), Manslaughter in the Second Degree (Penal Law § 125.15[l]), Assault in the First Degree (Penal Law § 120.10[l]), and Assault in the Second Degree (Penal Law § 120.05[2]). Defendant's co-defendants all pled guilty to various charges as detailed in defendant's brief (see Defendant's Brief at 2).

Before trial, the People moved to- dismiss the Manslaughter in the First Degree and the Assault in the First Degree charges. This motion was granted without objection. Thereafter, defendant was tried by a jury of his peers. This trial was the first time the full and graphic details of the crime, and defendant's involvement in it, became known to the court.

After hearing the evidence, the trial court submitted all of the remaining charged offenses to the jury for its consideration, and also submitted the lesser included offenses of Criminally Negligent Homicide (Penal Law § 125.10) under the Manslaughter in the Second Degree charge, and Assault in the Third Degree (Penal Law § 120.00[l]) under the Assault in the Second Degree charge. On September 17, 1997, after four days of direct and circumstantial proof and almost two days of deliberations, the jury convicted the defendant of Manslaughter in the Second Degree.

Following his conviction, defendant moved to set aside the jury's verdict pursuant to sections 330.30 and 330.40 of the Criminal Procedure Law on various grounds. The court denied all of defendant's claims, except those based on alleged juror misconduct, and ordered a hearing only on the specific issues of

whether extra-record evidence had been introduced into the deliberations and whether an adverse inference had been drawn from defendant's failure to testify.

On September 11, 1998, the 330.30 hearing was held. At the hearing, Denise Luce and Ruth Painter testified for the defense. Anthony Dieteman and Kathleen Hendrix, originally scheduled to be prosecution witnesses, were called by the defense after the People, assuming the defense had rested, made a motion for a ruling that the defendant had failed to meet his burden (1927). Investigator Harold Frank of the Office of the Attorney General testified for the People. After reviewing the transcript of the hearing, the exhibits offered during the hearing, and the legal papers of both counsel, the court denied defendant's motion. The court held that "no extra-record evidence was put before the jury ... I simply do not believe that either of the Loean jurors was ever inside the restaurant or claimed to have been inside the restaurant." (Court's Decision: 2054). On January 29, 1999, the court sentenced defendant to an indeterminate prison term of from four to twelve years.

## THE FACTS

### The People's Case

On Saturday evening, October 22, 1994, defendant met some friends and went out for the evening. These friends included co-defendants Brian Mooney, Cory Shea, Shane Appleby, Shane's twin brother Shawn Appleby, Keri Haggerty, her sister Sandra Sue Haggerty, and Troy Fusco; Carl Hollamby and Matthew Sweatland were also present. This group met at Keri's Haggerty's house. They were all drinking (Shawn Appleby: 1081). After leaving Haggerty's house, the group went to two bars that

evening, and stayed at the second bar until it closed (Shawn Appleby: 1084).

Sometime after 2:00 a.m. on October 23rd, the group went to the East Side Pizzeria on State Street in Olean (Shawn Appleby: 1084). Customers in the restaurant that night included: Dale Cummings and his wife; Pam Brochu and her fiance, Jim Cheesman; Larry Bedow; Robert Doxey and his son, Jack Doxey; Bob Burgett; Pat and Debbie Morgan; and Lester Harris, the town drunk (Wheeler: 1418). Gayle Wheeler was waitressing in the restaurant, and Ray Seeley was the cook (Wheeler: 1408; Seeley: 1370)

Defendant's group was loud and boisterous from the moment they got out of their cars (R. Doxey: 1180-81). Inside the restaurant, the group sat at two tables in the front, and continued to be loud, obnoxious, and vulgar (Cummings: 879; J. Doxey: 1149).

Shortly after defendant's group sat down and ordered, Kevin King, Kevin Kenyon, and Steve Hellwig came in. A member of the large group, believed to be Shawn Appleby, immediately made an insulting comment about Kevin Kenyon's appearance (Cummings: 881; Kenyon: 901; R. Doxey: 1185; Seeley: 1375). Kevin Kenyon, in an intoxicated state, took offense and challenged Shawn Appleby to join him outside for a fight (Cummings: 884). The large group stayed inside and just laughed (Cummings: 89 1).

Gayle Wheeler and Ray Seeley calmed things down and the three sat down at the counter to eat breakfast (Kenyon: 904; Hellwig: 939; Wheeler: 1415). The insults continued from the large group towards the group of three at the counter and the tension mounted (Kenyon: 903; J. Doxey: 1156-57).

Dale Cummings and his wife left the pizzeria, unable to deal with what was going on at the large table. Dale Cummings thought there was going to be a fight and feared for the safety of himself and his wife (Cummings: 887). Several other people in the restaurant, including Larry Bedow, Robert Doxey, and Gayle Wheeler, also felt that a fight might erupt (Bedow: 1032; R. Doxey: 1195; Wheeler: 1420).' Nonetheless, throughout this ordeal, Kevin King sat quietly, talking about how he was going to celebrate his upcoming birthday, and trying to calm down his friends (Kenyon: 906; Hellwig: 942).

Defendant, who was related by marriage to Steve Hellwig, went from his table where the large group sat to the three men at the counter. He told Hellwig not to blame him for his friends' behavior (Hellwig: 941). After overhearing defendant tell the three men at the counter that he was calming down his friends, Pam Brochu, a disinterested patron in the restaurant, heard defendant tell the large group that the three men were "skuzbags" (Brochu: 1337-38). She saw defendant go between the groups and get the large group more agitated (Brochu: 1367-68). Steve Hellwig also noted that after defendant came over to him and then walked back to his group, the taunts got worse (Hellwig: 1018). Indeed, Hellwig felt that defendant was not trying to be a peacekeeper, as the defense claimed at trial, but was instead "playing both sides" (Hellwig: 1017-18).

Eventually, as King, Kenyon and Hellwig got up to leave, another insult about the group's "scruffy" appearance was hurled at them from the large table (Brochu: 1339). Hellwig countered with a challenge to go out and "get it settled right now" and then left the restaurant (Hellwig: 943). In response, defendant turned to his friends and said "Are you going to take this shit?" (Shawn Appleby: 1097; Shane Appleby: 1136) or "Are we going to take this shit from them, let's go get them" (Brochu: 1339). Defendant

was the first person of the large group to get up and follow King, Kenyon, and Hellwig out the door (Hellwig: 1021; Bedow: 1031; Seeley: 1377; Wheeler: 1419). Although Robert Doxey testified that he thought one of the Applebys was the first one out the door, he admitted that he had told the Sheriff's Department the day after the fight that defendant was the first one out the door after the challenge (R. Doxey: 1207).

Mrs. Wheeler attempted to stop defendant from leaving, believing that "if he went out, the rest would follow him and that there would be a big fight" (Wheeler: 1420). Instead of listening to her, defendant pushed her aside and proceeded out the door. It was the first time that night that anyone had laid hands on anyone else (Wheeler: 1420).

Larry Bedow also tried to prevent defendant from going outside (Bedow: 1048). He asked defendant "if he would please sit down and just, you know, forget about it," but defendant just looked at him for a second and then walked by (Bedow: 1031-32). Mr. Bedow told the jury why he tried to stop defendant: "I just figured there was going to be trouble ... you know, if I could talk him out of it, why not" (Bedow: 1032).

Thereafter, the whole group of defendant's friends followed defendant out into the parking lot, and despite Ray Seeley's efforts to keep them inside the restaurant, there was "no stopping them" (Seeley: 1379; Wheeler: 1421). After the group at the large table rushed out into the parking lot after defendant, Gayle Wheeler called 911 (Wheeler: 1421). That was at 3:21 a.m. (Grube [911 operator]: 1242).

Outside, Steve Hellwig saw defendant rushing towards him in the parking lot (Hellwig: 946, 960). Someone reached over defendant and started to hit Hellwig (Hellwig: 947). He was hit

repeatedly and lost his glasses (Hellwig: 949, 964). He thought he was going to be killed (Hellwig: 1016). He saw a man with a blue and red and tan sweater and another man with a brown and tan sweater hit him, but he could identify no one else involved in his fight. His vision was blurred, and he did not see who was hitting Kevin Kenyon or Kevin King (Hellwig: 949).

Kevin Kenyon got hit while walking to his car (Kenyon: 908). He was knocked to the ground and covered his face. Kenyon had no idea who was hitting him, nor did he see who hit Kevin King or Steve Hellwig (Kenyon: 910).

Shawn Appleby, one of the co-defendants who pled guilty to Manslaughter in the Second Degree before trial, testified that he was the first out the door of the restaurant; he admitted that he had first hit Kevin Kenyon and then Kevin King. His brother Shane then swung at King as King -- who was only 5'5" tall and weighed 165 pounds -- crumpled to the ground (Shawn Appleby: 1097-98; Dr. Justin Uku: 1262). Kevin King fell by the front left tire of Jack Doxey's new red pick-up truck (Shawn Appleby: 1098). Shane Appleby admitted that he had hit King, but denied that he kicked him (Shane Appleby: 1144-45)., Kevin King never moved on his own again (Shawn Appleby: 1099).

Shortly after the commotion began outside, eighteen-year-old Jack Doxey went outside to check on and move his brand new truck (J. Doxey: 1159). The fight was going on right by his truck, which was located in the parking lot at the corner, where the side and front of the restaurant's sidewalks came together in a point (J. Doxey: 1160). When Jack went out to try to move his truck, he was grabbed by one of the men fighting (J. Doxey: 1161). His father, Robert Doxey, who identified Cory Shea as the man who grabbed his son, tried to help (R. Doxey: 1197). Shea put Jack down and grabbed Robert Doxey. Someone

then hit Robert over the head and they all fell into the restaurant fighting (R. Doxey: 1198-99).

After extricating himself from that fight and checking on his injuries, Robert Doxey and his son went outside and watched the fight from a safe distance away (R. Doxey: 1201). While they could not identify any particular person in the group, they saw Kevin King laying on the ground by the truck, being kicked so hard by this group that his red and black flannel shirt jacket was being "fluffed up like a pillow" (J. Doxey: 1163; R. Doxey: 1201). Jack Doxey saw approximately six people kicking, but could not identify any of them. He was scared and "shook up" (J. Doxey: 1164). Neither could Robert Doxey identify any of them (R. Doxey: 1201). He testified, however, that defendant was not just standing at the comer (R. Doxey: 1203). This was significant because defendant later told New York State Police Investigator Donald Rieger that he was standing just off the sidewalk during the fight, in an area that he identified on a small drawing (People's 39) with an "X" (Rieger: 1229). He further stated that he was not involved in the fight at all (John: 1218), yet repeatedly, witness after witness, seeing that "X", identified it as the place where the fight occurred and the place where Kevin King's body was found when it was over (Rieger: 1237-38; Brochu: 1347; Seeley: 1386; Wheeler: 1425).

After calling 911, Gayle Wheeler went outside and saw a "bunch of people crowded together and down on their knees and on their feet and saw fists flying and feet swinging. " She repeatedly asserted that everyone in that group that was fighting (Wheeler: 1422, 1425, 1431). She could not see their faces when she first approached them from behind, but later, when the group dispersed because the police had been called, she saw defendant running from the fight (Wheeler: 1424). When asked on cross-examination what she saw defendant doing when she got

outside the pizza shop, Mrs. Wheeler stated, "Actually see him do? Just that he was there in the fight" (Wheeler: 1426). She could not say who was specifically making contact with Kevin King's body (Wheeler: 1431).

Ray Seeley was also unable to identify the fighters during the fight itself, but he saw six to eight people involved in it (Seeley: 1382). He also recalled that no one was just standing and not fighting in the area where defendant claimed he was (Seeley: 1384). Mr. Seeley did, however, see people he knew who were not involved in the fight. These included Larry Bedow, Jim Cheesman, Bob Burgett, Pam Brochu. and the Doxeys. He saw that Kevin Kenyon had run away to Mastel Ford (Seeley: 1383). Matt Sweatland and Carl Hollamby were standing over by Baer Auto Parts (Seeley: 1381). He identified defendant's "X" on People's 39 in evidence as the place where the fight was taking place.

Pam Brochu had never met any of the participants of that night's fights, with the exception of Steve Hellwig, who was a neighbor (Brochu: 1333). She went outside after the fight began, and saw Kevin King's body being kicked so hard it was moved by the force of the kicks (Brochu: 1346). She, too, noted that no one was at the comer of the parking lot who was not involved in the fight, and identified defendant's "X" as the place where Kevin King's body lay (Brochu: 1347).

When the fight was over, Kevin King lay dying on the ground, and Mrs. Wheeler called 911 again. That call was made at 3:25 a.m., only four minutes after the first call (Grube: 1242). Defendant left the scene, despite Mrs. Wheeler's entreaties not to leave. Ms. Brochu got his license plate number and gave it to the police at a later date (Brochu: 1353). The police returned

defendant to the scene a short time after the fight had ended (Rieger: 1233).

The next morning, defendant gave a statement to Lieutenant Detective John, this statement was admitted into evidence at trial (John: 1217). In the statement, defendant confirmed said that shortly after Kevin Kenyon got to the restaurant, he was insulted and challenged the large group to a fight. Defendant said nothing and did nothing at that time, and the large group just laughed (John: 1218).

The day after the fight, Pam Brochu was interviewed by Ernest Travis, a member of the Cattaraugus County Sheriff's Department. She described the perpetrators by clothing and hair color (Brochu: 1344-45). She then described what she saw each of these people do:

A. The man in the Indian sweater [was] kicking him in the head.

Q. Kicking who?

A. Kevin King, and then he stomped on his head, and the one in the light colored sweater had kicked him in the back and the lower back. The female, she had kicked him in the back also, and then the man with the dark hair kicked him in the side.

Q. The dark hair and dark shirt?

A. Dark hair, dark shirt and blue jeans, kicked him in the side right around the rib

> cage area ... and then the man with the medium brown hair and the dark shirt, light jeans, he kicked him in the waist.

(Brochu: 1345-46).

After the autopsy results became public, Ms. Brochu initiated her own, amateur investigation (Brochu: 1348). She tried to match names to faces by looking in yearbooks. She gave the names she had discerned through her "investigation" to the State Police in April of 1995. These did not include the defendant. However, she was unable to identify anyone other than the Applebys when she viewed photo arrays of her "suspects" (Brochu: 1366-67).

Ms. Brochu's descriptions to Lt. Travis were compared with a photograph of defendant and his friends that had been taken earlier on the evening of October 22, 1994, and was admitted as People's 33 in evidence (Shawn Appleby: 1078). In that photograph, only one person -- defendant -- had dark hair and was wearing a dark shirt (Seeley: 1407).

During his interview with Ms. Brochu, Lt. Travis, who had been to the first autopsy of Kevin King, attempted to dissuade her from her description of the blows she had seen delivered to Kevin King's body (Brochu: 1347). Months after Pam Brochu's initial description of the fatal fight, the second autopsy would verify that the blows she saw administered to Kevin King were, indeed, evidenced on his body. Both Dr. Justin Uku, who performed the first autopsy the morning of Kevin King's death, and Dr. Michael Baden, who performed the second one on April 17, 1995, testified that it typically takes 24 hours for a body to show recent bruises (Uku: 1260; Baden: 1290). Unaware of x-rays taken of Kevin King's body at Olean Hospital showing

fractured ribs, and under the misapprehension that Kevin King was at the bottom of a "football pile-on," Dr. Uku performed the autopsy before the bruises on the body became apparent (Uku: 1269). The cause of death, based upon incomplete and inaccurate information, was initially believed to be traumatic asphyxia (Uku: 1261). Subsequent investigation and further autopsy results proved that Kevin King died from cardiac arrhythmia due to blunt force trauma to the chest, an opinion-held by both Dr. Baden and Dr. Uku at the time of the trial (Uku: 127 1; Baden: 13 10-11). Kevin King did not die from being punched in the head (Baden: 1311).

While defendant was able to tell investigators from the State Police who was involved in the altercations with Steve Hellwig and Kevin Kenyon (Rieger; 1235-36), neither he nor any of his friends were willing or able to say who was kicking Kevin King (Shawn Appleby: 1103; Shane Appleby: 1145; Rieger: 1237). Shawn Appleby, however, did admit that he did not see defendant being a peacekeeper, or simply standing at the comer "minding his own business" (Shawn Appleby: 1103-04). He described what happened after Kevin King went down:

Q: The area of the fight was about seven feet long and everybody that [sic] was in that seven foot area and people were just kicking and punching, is that right?

A. That's right.

Q. And that is where John Reynolds was, right?

A: In the vicinity, yes.

Q: In that seven-foot area of the people kicking and punching.

A: Yes.

(Shawn Appleby: 1119-20).

## Defendant's Case

Carl Hollamby was the only witness who testified for the defense. Hollamby admitted that defendant's so-called peacekeeping efforts did not settle anything down (Hollamby: 1477). He also confirmed that defendant was the first person to follow Hellwig, Kenyon, and King out the door (Hollamby: 1478). Hollamby was unwilling or unable to identify any of the people who were beating and kicking Kevin King (Hollamby: 1480).

## POINT ONE

## DIRECT EVIDENCE OF DEFENDANT'S GUILT ELIMINATED THE NEED FOR A CIRCUMSTANTIAL EVIDENCE CHARGE.

Eyewitnesses saw and heard defendant inciting his accomplices to "get" the victims, and then saw him follow the victims out into the parking- lot of the restaurant. In his later statement, defendant also placed himself at the very location where Kevin King was beaten to death, and eyewitnesses to the beating testified that everyone at that location was involved in the beating. Despite this evidence that defendant acted recklessly, and by those reckless actions participated in the death of Kevin King, defendant claims that the case against him was entirely circumstantial, and that the court should have given a circumstantial evidence charge. Defendant is wrong, and even if such a charge was warranted, any

error was harmless because of the overwhelming evidence of defendant's guilt.

Direct evidence means evidence that "tends to establish, without the need of inferences, one or more of the particular facts at issue." People v. Daddona, 81 N.Y.2d 990, 992 (1993). Circumstantial evidence, by contrast, requires the jury to draw inferences from proven facts in order to conclude that the defendant is guilty. See People v. Ford, 66 N.Y.2d 428 (1985).

When the People's proof consists of both direct and circumstantial evidence, a special instruction regarding the latter is not required. People v. Ruiz, 52 N.Y.2d 929 (1981); People v. Guidice, 83 N.Y.2d 630 (1994); People v. Macri, 244 A.D.2d 970 (4th Dept. 1997); People v. Robbins, 229 A.D.2d 1008 (4th Dept. 1996). Only when a case is wholly circumstantial will the court be obliged to give the charge. People v. Benzinger, 36 N.Y.2d 29 (1974). Even if proof of any one element of a crime charged is wholly circumstantial, a court is still not required to give a special circumstantial evidence instruction so long as any one element is supported by direct evidence. People v. Daddona, 81 N.Y.2d at 992-93; People v. Barnes, 50 N.Y.2d 375 (1980).

This Court, like the Court of Appeals in Daddona, has held that a trial court is not required to give a circumstantial evidence charge when some elements of a charged crime are proven by direct evidence, even though another element of the same crime is supported solely by circumstantial evidence. In People v. Tribunella, 149 A.D.2d 925 (4th Dept. 1989), for example, a possession of stolen property case, this Court held that, "The court was not obliged to charge the jury that the People were required to prove the element of knowledge that the property was stolen to a 'moral certainty.' That standard (to a 'moral certainty') has no application where circumstantial evidence relates to proof

of only one element." Id. at 926 (citations omitted). Similarly, in People v. Smeraldo, 242 A.D.2d 886 (4th Dept. 1997), this Court rejected the need for a circumstantial evidence charge in a criminal mischief case where the defendant was seen spraying a liquid on his ex-girlfriend's car. The fact-finder apparently had to infer that this substance was acid, which damaged her car. This Court ruled that there was direct evidence, sufficient to negate the necessity of the moral certainty charge. Id.

Turning to the facts of this case, there was ample direct evidence -- in the form of eyewitness testimony and exhibits -- supporting defendant's conviction for reckless manslaughter and eliminating the need for a circumstantial evidence charge as to that count. First, there was direct evidence that defendant was present inside the restaurant, and that he was instrumental in elevating the level of tension between the victim's group of friends and his own group. Indeed, eyewitnesses heard members of the larger group hurling insults at the small group (Kenyon: 903; J. Doxey: 1156-57), and saw defendant going back and forth between the two groups; they also heard him tell the three victims that he was calming down his friends, and then heard him tell the large group that the three were "skuzbags" (Brochu: 1337-38). After this, eyewitnesses saw the large group become more agitated (Brochu: 1367-68).

Further direct testimony established that defendant precipitated the actual physical confrontation in the parking lot. After Steve Hellwig, a member of the small group, issued a challenge to the large group to go out and settle things "right now" (Hellwig: 943; Brochu: 1339; Wheeler: 1419), eyewitnesses heard defendant state, "Are we going to take this shit?" or "Are you going to take this shit?" (Hollamby: 1473; Shawn Appleby: 1097; Shane Appleby: 1136). Pam Brochu, a patron not with either

group, heard the statement, "Are we going to take this shit from them, **let's go get them**" (Brochu: 4339 [emphasis added]).

Direct testimony also showed that defendant was the first person out into the parking lot after issuing this challenge. Indeed, several eyewitnesses testified that not only was defendant the first person out the door after Hellwig's challenge (Seeley: 13 77, 1405; Bedow: 1031; Wheeler: 1419; Hellwig: 945), but that he actually pushed the waitress out of the way when she tried to stop him. She tried to stop him because she knew that his leaving would result in a huge fight in the parking lot (Wheeler: 1420).

As the restaurant's patrons feared, after defendant led his group out of the restaurant, a fight immediately ensued and Kevin King was beaten and kicked to death. Testimony showed that Kevin King was immediately knocked down and out by Shawn Appleby, and he never got up again (Shawn Appleby: 1098, 1104; Shane Appleby: 1139). The fight between the large group and the small group culminated in a large fight by Jack Doxey's truck (Brochu: 1346-47, Wheeler: 1422, 1423). Kevin King was at the bottom of that fight (Wheeler: 1425; Seeley: 1387). Not only was everyone by the Doxey truck fighting (Seeley: 13 84; Wheeler: 1425, 143 1), but defendant was in that group (Wheeler: 1424, 1426; Shawn Appleby: 1119-1120). Indeed, in his later statements, defendant placed himself exactly at the place where this fight occurred (People's Exhibit 39 at 1229).

As the trial court held in denying defendant's C.P.L. § 330.30 motion on this issue, this eyewitness testimony provided direct evidence of defendant's reckless conduct that night, which disentitled him to a circumstantial evidence charge. The court noted, "At the trial, there was direct evidence that defendant stood up and said, 'Are we going to take this shit?' There was further evidence that defendant then led a charge of ten people out the

door to confront three people in the parking lot. Given the hostilities that had occurred inside, a reasonable jury could consider that conduct reckless. Had defendant said nothing, it is likely nothing would have happened" (1811-12).

The trial court's denial of a circumstantial evidence charge is consistent with precedent from this Court. For instance, in People v. Lawrence, 186 A.D.2d 1016 (4th Dept. 1992), this Court noted that where "the circumstances surrounding the crime were established by direct proof in the form of the prosecutions witnesses' testimony, and the inferences to be drawn therefrom were clear, strong and logical," a circumstantial evidence charge is not required [citations omitted]. Id. In that case, the Court found direct evidence, despite the fact that no one actually saw the defendant kill the victim. Instead, eyewitnesses placed the defendant at the scene, walking toward the victim, and after hearing shots saw him standing near the victim's car holding a smoking gun. An eyewitness also heard either. the defendant or his co-defendant yell, "where is the money," which the Court interpreted as a robbery attempt. Id.

The circumstances in defendant's case are remarkably similar. Not only was there direct evidence of defendant's presence in the group that was beating Kevin King to death, but there was also direct evidence that he had instigated the fight and had led the charge out the door after the victims. Thus, under the reasoning in People v. Lawrence, 186 A.D.2d at 1016, the trial court was entirely correct in finding that there was direct evidence of defendant's guilt, and that he was therefore not entitled to a circumstantial evidence charge.

The defense contends that there is a lack of direct evidence because there is a lack of eyewitness testimony identifying defendant landing a punch or kick on Kevin King.

This contention, however, ignores the applicable law. Defendant was charged as an accessory under Penal Law § 20.00. Under this theory, there need not be any evidence that he touched the deceased at all, only that he intentionally aided others to recklessly cause the victim's death (Penal Law §§ 20.00, 125.15[l]). In other words, defendant's actual physical contact with the deceased is not an element of the crime charged. In People v. Russell, 91 N.Y.2d 280 (1998), three defendants were engaged in shoot-out against each other. An innocent bystander was shot, but the origin of the fatal bullet was unknown. The Court of Appeals upheld all three defendants' convictions for depraved indifference murder. "[T]he prosecution was not required to establish that each defendant fired the fatal shot when the evidence was sufficient to establish that each defendant acted with the mental culpability required for the commission of depraved indifference murder, and each defendant 'Intentionally aided' the defendant who fire the fatal shot. . . . " Id. at 168.

Significantly, the Russell Court cites People v. Abbott, 84 A.D.2d 11 (4th Dept. 1981), as an apt illustration of this point. In Abbott, defendant and his co-defendant engaged in a drag race that resulted in Abbott's car striking another car and killing the driver and two passengers. Defendant Moon claimed that he was not responsible, since his car did not hit the victim's. This Court rejected that argument, ruling that "He accepted Abbott's challenge ... [H]is conduct made the race possible." Id. at 15. In the instant case, it was defendant who, by his words and his actions, accepted Steve Hellwig's challenge, which ultimately resulted in Kevin King's death.

"'[G]iving assistance or encouragement to one it is known will thereby engage in conduct dangerous to life should suffice for accomplice liability as to crimes defined in terms of recklessness or negligence.' (LaFave & Scott, Criminal Law § 64 p. 511)."

Id. at 15. Similarly, in People v. Ozarowski, 38 N.Y.2d 481 (1976), even where the defendant was not carrying a baseball bat and did not strike the victim, he was held to have the same intent and criminal liability as the actual assailants because he was in the same group, and hid with the assailants before striking the victim.

Despite the fact that defendant need not have had direct contact with Kevin King to be held criminally responsible for his death, the jury did hear evidence that defendant actually kicked Kevin King while he was down. Pam Brochu testified that less than two days after she witnessed the fatal fight at the East Side Pizzeria, she identified a dark-haired man In a dark shirt as having kicked Kevin King in the ribs (Brochu: 1345-46). A picture of defendant and his friends taken earlier on the night of the attack was introduced into evidence and established the clothing worn by each of the them (Shawn Appleby: 1078). The only person who matched that description was defendant. It is uncontested that Kevin King died as a result of the injuries he sustained in that fight.

Further, this case is legally and factually different than the cases cited by the defense where one member of a group takes out a deadly weapon and begins to attack another. In those cases, it is unfair to impute the specific intent of the attacker, which may have been spontaneously formed, to the other members of the group, without direct evidence of the others' intent. Here, we have defendant joining a group whose clear intent is to fight a vastly one-sided fight, i.e., eight against three, and ultimately, several against one helpless on the ground. This is supported by the direct evidence of defendant's words (inciting his group) and deeds (fighting with his group). See People v. Russell, 91 N.Y.2d at 168 ("Indeed, unlike an unanticipated ambush or spontaneous attack that might have taken defendants by surprise, the gunfight in this case only began after defendants acknowledged and accepted each

others' challenge to engage in a deadly battle on a public concourse.").

Defendant further protests that even if he was not legally entitled to a circumstantial evidence charge, the trial court should nonetheless. have given a charge regarding circumstantial evidence in general, because some of the evidence was circumstantial. This issue is not preserved for review. The court advised all counsel before the charge of its proposed instructions (1441-43). Defense counsel asked for "a circumstantial evidence charge" (1443). All parties understood this to mean the "moral certainty" charge, and this is acknowledged in defendant's appellate brief (Defendant's Brief at 35). Following its jury charge, the court asked for any exceptions following its jury charge (1562). Defense counsel had none. Defendant cannot now, long after the court could have addressed the issue, claim that the definition of circumstantial evidence should have been given. C.P.L. § 470.05(2). See also People v. Whalen, 59 N.Y.2d 273 (1983); People v. Snyder, 124 A.D.2d 394 (3d Dept. 1986).

Were this Court to reach the merits, however, defendant would still fall, since the trial court properly instructed the jury on the elements of the crimes charged and the People's burden of proof As far back as 1977, the Court of Appeals articulated that "Knowledge, of course, may be shown circumstantially by conduct or directly by admission, or indirectly by contradictory statements from which guilt may be inferred." People v. VonWerne, 41 N.Y.2d 590, 591 (1977). The jury should be cautioned that the element of knowledge, like any other, must be proven beyond a reasonable doubt. Id. at 591. The trial court in the case at bar repeatedly admonished the jury of the People's burden to prove all elements of the crimes charged beyond a reasonable doubt (839, 1534, 1548, 1555).

The cases cited by defendant, while distinguishable from the case at bar because they are intent crimes, reiterate the proposition that mere presence at the scene is insufficient proof of guilt. People v. Sanchez, 61 N.Y.2d 1022 (1984); People v. McLean, 107 A.D.2d 167 (1st Dept. 1985). For instance, in People v. Marin, 65 N.Y.2d 741 (1985), an arson case, the Court of Appeals noted that defendant's employment in the hotel where he worked provided an innocent explanation for his presence "at all times and places except for any presence in the Common-Haight intersection [the origin of the fire] at the moment the fire was set." Id. at 743. But the trial court in the case at bar cautioned the jury that "it is not sufficient if the People establish merely that the defendant is associated with the others or that the defendant was present at the time the others committed the conduct alleged to constitute the different crimes" (1550). This admonition was repeated at least four other times during the jury's requests for read backs (1584, 1590, 1603, 1620). The jury was also properly instructed on the law regarding the elements of manslaughter in the second degree, accessorial liability, and the People's burden of proof (1534, 1545-46, 1548, 1554-55). Just as in People v. Flemming, 191 A.D.2d 987 (4th Dept. 1993), any error that may have occurred by the court's failure to define circumstantial evidence would not require reversal, since "[t]he court properly charged the jury on the elements of knowledge and intent and that it was the People's burden to prove both beyond a reasonable doubt." Id. at 988.

Finally, even if there was any error in the trial court's failure to give a circumstantial evidence charge, or in failing to define circumstantial evidence, any error was harmless. The Court of Appeals, in People v. Brian, 84 N.Y.2d 887, 889 (1994), held that the failure to give a circumstantial evidence charge may be harmless, when there is "no reasonable possibility, let alone a significant probability that the jury would have

acquitted" if the charge had been given. See also People v. McHenry, 233 A.D.2d 866 (4th Dept. 1996); People v. Lawrence, 186 A.D.2d at 1016 (even if court erred in failing to give a circumstantial evidence charge, the error would be harmless).

Likewise, in defendant's case, even if this Court concludes that the evidence was purely circumstantial, that evidence was, nonetheless, overwhelming. Not only did defendant incite and encourage his friends to "get" the victims, but he led them out of the restaurant and into the parking lot. Once outside, defendant was unquestionably a member of the group that was beating and kicking Kevin King to death. He was the only person who matched Pam Brochu's description of a dark-haired man in a dark shirt who was kicking King, and defendant himself placed himself in the very spot where King was killed when he gave his statement to investigators. Finally, defendant's friends and accomplices specifically testified that everyone in this group was beating King. And, of course, defendant fled from the scene at the approach of the police, evidencing his consciousness of guilt. Given this overwhelming evidence, even if there was any error in the trial court's failure to give a circumstantial evidence charge, that error was harmless, and provides no basis for reversal of defendant's conviction.

In sum, defendant was convicted on the basis of direct and circumstantial evidence, and the trial court properly refused to give the "moral certainty" charge. Given the sufficiency of the jury instructions and the failure of defendant to object to them, reversal is not appropriate in this case. Finally, even if there was error in the charge, the overwhelming evidence of defendant's guilt assures that any error was harmless.

## POINT TWO

## DEFENDANT FAILED TO PRESERVE FOR APPELLATE REVIEW AN ALLEGED YET NONEXISTENT C.P.L. §270.35 VIOLATION, AND HIS CLAIM THAT HE WAS DENIED HIS RIGHT TO BE PRESENT DURING THE DISMISSAL OF A SWORN JUROR IS ENTIRELY WITHOUT MERIT.

After learning of possible juror misconduct, the trial court held an in camera proceeding in the presence of defendant and his counsel. During that hearing, the court questioned an investigator from the District Attorney's Office who revealed the jury's misconduct, but it did not question the actual juror at issue. Following that questioning, defendant's counsel requested that the juror be discharged, and the court granted his motion. Defendant and his counsel were present for all of these proceedings, except for the actual discharge of the juror.

Despite his expressed view at trial that the juror was disqualified for continued service, defendant claims on appeal that C.P.L. §270.35 required the court to question the actual juror before discharging him. He also claims that he had a right to be present at the discharge of the juror, and that his absence from that proceeding violated his right to be present at all material stages of the trial. Both of these claims are wholly without merit, and defendant's claim that the court did not follow the statutorily-mandated procedure is unpreserved for appellate review.

**A. The In Camera Proceeding**

Four witnesses into the People's case, the court notified all parties of a problem regarding one of the jurors. During an in camera proceeding, with all counsel and defendant present (1059), the court conducted an inquiry of Thomas Stouffer, a member of the Cattaraugus County District Attorney's Office and a retired Senior Investigator for the State Police. Investigator Stouffer advised the court that a member of the jury, Timothy Donovan, an old acquaintance of his, had solicited his help in obtaining a reduced plea for a speeding ticket. Specifically, Mr. Donovan had asked Investigator Stouffer to help him "plead his case" to Assistant District Attorney Leo Murphy, and gave him a letter to that end (1060).

Defense counsel immediately moved for the juror's removal, citing the appearance of impropriety, the juror's failure to disclose in voir dire his acquaintance with a member of the District Attorney's staff, and the concern that Mr. Donovan will feel he "owes" the District Attorney if he is given special treatment (1063-1064). During the court's discussions with counsel and defendant, the issue of inquiring of the juror himself was considered. Defense counsel made no request for such inquiry, and suggested that if any inquiry were held, it should be limited only to whether the juror had sent the letter. After further discussions, it was agreed by all parties present that this issue was not in dispute (1066).

Given defense counsel's concerns and the proof provided by Investigator Stouffer of the juror's misconduct, the court decided, on the record, with all counsel and defendant present, that defendant's motion must be granted and the juror must be disqualified (1068). It was not until that decision was made that the court requested that the defense attorney and prosecutors, as

well as defendant, leave the chambers while the court notified the juror of its ruling - There was no objection made to this request (1071). The juror was discharged and replaced with the first alternate, in compliance with C.P.L. § 270.35(l).

**B. The Court Properly Discharged the Juror, and Defendant's Claim to the Contrary is Unpreserved for Appellate Review.**

By moving for the removal of the juror, and repeatedly failing to object to the process engaged in by the court, defendant has failed to preserve his claim of an alleged violation of C.P.L. § 270.35. See C.P.L. § 470.05(2); People v. Hopkins, 76 N.Y.2d 872 (1990); People v. Crossland, 251 A.D.2d 509 (2d Dept. 1998); People v. Gonzalez, 247 A.D.2d 328 (1st Dept. 1998); People v. Glover, 237 A.D.2d 104 (1st Dept. 1997); People v. Robinson, 180 A.D.2d 767 (2d Dept. 1992); People v. Pierce, 97 A.D.2d 904 (3d Dept. 1983).

If, however, this Court were to look to the merits of the argument, defendant's claim would still fail. Having succeeded in his motion to disqualify the jury, defendant now claims that the court violated the provisions of C.P.L. § 270.35 in failing to conduct a probing inquiry of Mr. Donovan prior to granting defendant's motion to discharge the juror. The relevant portions of C.P.L. § 270.35 read as follows:

> If at any time after the trial jury has been sworn and before the rendition of its verdict,. . . the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case or has engaged in misconduct of a substantial nature, but not

> warranting the declaration of a mistrial, the court must discharge such juror. If an alternate juror or jurors are available for service, the court must order that the discharged juror be replaced by the alternate juror whose name was the first drawn and called.

C.P.L. § 270.35(l). In People v. Buford, 69 N.Y.2d 290, 299 (1987), the Court of Appeals recommended that, in making this inquiry, the court question each juror individually in camera and in the presence of the defendant and the attorneys, and should then place its findings on the record. In subsequent cases, however, both the Court of Appeals and this Court have recognized that trial judges are given some degree of latitude in making the necessary findings to determine whether a juror is grossly disqualified for further service. See, e.g., People v. Rodriguez, 71 N.Y.2d 214, 218-20 (1988); People v. Williams, 242 A.D.2d 917 (4th Dept. 1997). In Williams, for example, this Court noted that given this latitude, there was no error even when the trial court failed to conduct any inquiry to determine whether a sworn jury was unqualified to continue serving. Id. Other courts have refused to find error in failing to conduct a more thorough inquiry when it is the defendant who requests the discharge of the sworn juror. See People v. Rodriguez, 71 N.Y.2d at 220; People v. Carbonaro, 162 A.D.2d 459 (2d Dept. 1990).

There was no violation of these principles when the trial court discharged juror Timothy Donovan. After holding a hearing, the court found that juror Donovan had engaged in substantial misconduct by attempting to obtain a benefit from a member of the office that was prosecuting the case the juror was hearing. Not only did the court place its finding on the record to support its decision to discharge the juror, but it conducted the hearing in the presence of defendant and his counsel. All of the

facts necessary to determine the juror's misconduct were readily apparent during this in chambers proceeding. Consistent with this Court's holding in People v. Williams, 242 A.D.2d at 917, the trial court was not required to make further inquiry of the juror on this issue. See also People v. Garrow, 233 A.D.2d 856 (4th Dept. 1996); People v. McIntyre, 193 A.D.2d 626 (2d Dept. 1992).

Moreover, in his brief, defendant ignores the fact that it was his counsel who requested the discharge of the juror (1063-64). Thus, this case is similar to People v. Carbonaro, 162 A.D.2d at 459, in which the Second Department refused to find error in the discharge of four sworn jurors when the defendant had consented to their discharge. See also People v. Rodriguez, 71 N.Y.2d at 220. And this case is unlike People v. Buford, 69 N.Y.2d 290, supra, upon which defendant relies (Defendant's Brief at 43-44), because that case involved the discharge of a sworn juror over the, defendant's objection. Id. at 300. By contrast, here, where defendant not only did not object, but actually moved for the juror's discharge, any claim of impropriety is unavailing. People v. Carbonaro, 162 A.D.2d at 459.

Accordingly, defendant has failed to preserve his claim that the court failed to conduct an adequate inquiry before discharging juror Donovan from continued service on defendant's jury. And review of this unpreserved claim in the interest of justice is not warranted, not only because there was no error in the court's decision, but also because it was defendant who requested the juror's discharge.

**C. Defendant had no Right to be Present when the Court Met with Juror Donovan and Informed him that he had been Discharged.**

There is no merit in defendant's claim that he was deprived of a right to be present at a material stage of the trial. He was present with counsel when the facts upon which the juror's misconduct was based were brought to light. He was present when his attorney moved for the juror's removal. He was present for the court's decision to grant that motion. Inasmuch as the court's notification of the juror's removal was nothing more than a ministerial duty at that point, defendant had not right to be present at that proceeding.

Pursuant to section 260.20 of the Criminal Procedure Law, a defendant has a statutory right to be present "during the trial of an indictment." This has been held to require a defendant's presence during the impaneling of the jury, the introduction of evidence, the summations of counsel, and the court's instructions to the jury. People v. Mullen, 44 N.Y.2d 1, 4 (1978); see also People v. Antommarchi, 80 N.Y.2d 247 (1992). In addition to this statutory right, a defendant has a due process right to be present "at his trial 'to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only. People v. Mullen, 44 N.Y.2d at 4-5 (quoting Snyder v. Massachusetts, 291 U.S. 97, 108 [1934]). Under this statutory test, the defendant's presence is required "only where his absence would have a substantial effect on his ability to defend." Mullen, 44 N.Y.2d at 5.

In Mullen, the trial court had questioned a sworn juror in chambers, in the presence of the attorneys but in the defendant's absence, to determine whether the juror could continue serving on

the jury. The juror informed the court that his knowledge of the defendant's prior criminal case would not affect his decision in the present case, and the court allowed the juror to remain on the jury. The Court of Appeals held that this in camera proceeding did not constitute a material part of the trial at which the defendant had a right to be present, and that his absence at this proceeding "did not have a substantial effect on his opportunity to defend." Id. at 5-6.

Consistent with Mullen, there was no violation of defendant's statutory or constitutional right to be present in this case. After all, unlike the defendant in Mullen, defendant was present at the actual hearing in which the juror's qualifications were discussed, and he was present when his counsel requested that the juror be discharged. He was also present when the court agreed to discharge the juror. In fact, the only proceeding at which defendant was absent was the purely ministerial conference between the judge and the juror at which the judge informed the juror that he had been discharged. It cannot be said that that proceeding involved any potential for meaningful input by defendant. Therefore, his presence was not required at that proceeding. See People v. Mullen, 44 N.Y.2d at 5-6; see also People v. Ronan, 88 N.Y.2d 18, 26-27 (1996); People v. Williams, 202 A.D.2d 1004 (4th Dept. 1994).

* * *

In sum, defendant has failed to preserve for appellate review his claim that the court conducted an insufficient inquiry before discharging juror Donovan as grossly unqualified to remain on this jury. In any event, there is no merit to defendant's claim of error, especially because defendant himself requested that the juror be discharged. Finally, under well-settled caselaw from the Court of Appeals, defendant had no right to be present at the proceeding in which the trial court told the juror he had been

discharged. Thus, this entire claim presents no basis for reversal of defendant's conviction.

## POINT THREE

## NO MISCONDUCT OCCURRED DURING THE JURY'S DELIBERATIONS (Answering Point IV of Defendant's Brief).

After the jury found defendant guilty of second-degree manslaughter, the court polled the jury and all jurors, including Denise Luce and Ruth Painter, orally acknowledged their vote on the record (1622-23). Defendant subsequently brought a motion to set aside the verdict pursuant to sections 330.30 and 330.40 of the Criminal Procedure Law alleging, *inter alia*, juror misconduct. Defendant specifically alleged harassment of juror Denise Luce, injection of the Olean jurors' personal knowledge of the crime scene into the deliberations, and failure to adhere to the "no adverse inference" charge, based on defendant's failure to testify (1633-1664). With respect to the juror misconduct claims, the court held a hearing, following which it denied defendant's motion (1808-14).

On appeal, defendant argues that the verdict should have been set aside, because some of the jurors were familiar with the crime scene and imparted extra-record information to the other jurors. He also claims that the verdict should have been set aside because a juror commented on defendant's failure to testify. These claims are not supported by the record, and do not require the reversal of defendant's conviction.

Criminal Procedure Law §330.30(2) governs a defendant's motion to set aside a jury's verdict based on allegations of juror misconduct. That section provides:

> At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:
>
> ... That during, the trial there occurred l out the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict;

Although C.P.L. §330.30 provides for relief for proven instances of juror misconduct, statements made by jurors generally may not be used to impeach a verdict once the jury has been discharged. People v. De Lucia, 20 N.Y.2d 275 (1967). This rule protects jurors from "continuous posttrial harassment," promotes the finality of verdicts, and maintains the validity of the jury as a judicial decision-making body. Ld. at 279. As the Court held in De Lucia:

> With regard to jury room deliberations, scarcely any verdict might remain unassailable, if such statements were admissible. Common experience indicates that at times articulate jurors may intimidate the inarticulate, the aggressive may unduly influence the docile. Some jurors may "throw in" when deliberations have reached an impasse. Others may attempt to compromise. Permitting jurors to testify regarding such occurrences would create chaos.

People v. De Lucia, 20 N.Y.2d at 278. This general rule applies even in situations in which jurors allege after the verdict that during deliberations another juror threw a chair at them, People v. Rujak, 123 A.D.2d 277, 279 (1st Dept. 1986); People v. Jacobson, 109 Misc.2d 204 (Bronx Sup. Ct. 1981), aff'd, 89 A.D.2d 826 (1st Dept. 1982), or threatened to throw them out a window, People v. Redd, 164 A.D.2d 34 (1st Dept. 1990). As the First Department held, "Such intense feelings and emotional manifestations often accompany the free and unfettered exchange of views that are the hallmark of the heightened atmosphere in which the jury's decision making process takes place." People v. Redd, 164 A.D.2d at 37. They are not to be examined after the verdict. Id.

There is a narrow exception to this general rule, however, when the jury's verdict is alleged to be the result of an improper outside influence. People v. De Lucia, 20 N.Y.2d at 279; People v. Young, 197 A.D.2d 874, 875 (4th Dept. 1993); People v. Dashnau, 187 A.D.2d 966, 966-67 (4th Dept. 1992); People v. Rhodes, 92 A.D.2d 744, 745 (4th Dept. 1983). This includes both corrupt attempts to influence the jury process, as well as well-intentioned jury conduct that tends to put the jury in possession of evidence not introduced at trial. People v. Brown, 48 N.Y.2d 388, 393 (1979). But not every misstep by a juror rises to the inherently prejudicial level at which the verdict must be set aside. Id. at 394; see also People v. Testa, 61 N.Y.2d 1008, 1009 (1984) ("inquiry into the deliberative process for the purpose of impeaching a verdict should not be undertaken except in extraordinary circumstances"). Instead, to be entitled to relief, a defendant must show .'prejudice to a substantial right." People v. Irizarry, 83 N.Y.2d 557, 561 (1994). Thus, when improper information comes before the jury, the court must examine the nature of that material and the likelihood that prejudice would be engendered by it. Brown, 48 N.Y.2d at 394.

Examining defendant's claims of juror misconduct under these standards demonstrates that the trial court properly denied his motion to set aside the verdict. Defendant first complains that a juror commented on defendant's failure to testify.

This claim is based on incredible statements by two jurors, which were refuted by other jurors testifying at the 330.30 hearing. Denise Luce, juror number eleven in the case at bar, initially claimed that a male juror had stated that defendant did not take the stand in his own defense (1820). Later, however, Ms. Luce testified that it could have been a female juror who had made that statement (1872). Mrs. Ruth Painter, juror number nine, also testified that she heard a juror say that defendant did not testify (1904). Mrs. Painter admitted on cross-examination, however, that she had previously signed an affidavit in which she stated that she had no recollection of anybody saying that defendant did not take the stand (1921). Indeed, Mrs. Painter, an elderly woman, repeatedly testified that she had no specific recollection of anything that had happened during jury deliberations (1906, 1907, 1908, 1909, 1919, 1922). Anthony Dieteman, one of the two jurors from Olean, testified that he had never heard anyone say that defendant did not take the stand (1963). Kathleen Hendrix, the other Olean juror, also testified that there was no discussion about the defendant not taking the stand (1983).

Based on this testimony, there is no credible evidence that the jury drew an unfavorable inference from the fact that defendant did not testify. Indeed, the hearing testimony established that the jury scrupulously followed these instructions. Significantly, all of defendant's hearing witnesses, including Ms. Luce and Mrs. Painter, unequivocally stated that the defendant's failure to take the stand was not an issue in their deliberations because the trial court had instructed them not to

consider it (Luce: 1873; Painter: 1922; Dieteman: 1963; Hendrix: 1983). Nor is there any allegation that the trial court failed to properly charge the jury regarding this point of law. Indeed, the court did charge the jury on this point (844; 1540-41). A jury is presumed to have followed the court's instructions not to draw any unfavorable inference from the fact that the defendant did not testify. People v. Brown, 196 A.D.2d 465 (1st Dept. 1993). Thus, there is no merit to defendant's claim that the verdict should be set aside on this ground.

Equally unavailing is defendant's contention that extra-record information was inserted into the jury's deliberations. As an initial matter, defendant waived his right to bring this claim by failing to explain why he did not challenge these jurors during voir dire when their residence in Olean was discussed. See People v. Lanaux, 197 A.D.2d 908 (4th Dept. 1993). Indeed, defendant was aware from the beginning of the trial that the two jurors alleged to have committed the misconduct, were from Olean, as was defendant's trial counsel (381). During voir dire, defendant's attorney elicited from Mr. Dieteman that he had lived in Olean all of his life, that they had known each other from the Olean area for at least twenty years, and that they had even caddied together (551, 1956). Counsel later elicited in voir dire that Mrs. Hendrix was also from Olean and that she drove by the crime scene every day (809-10). Despite his awareness of these jurors having or expressing prior knowledge of the area and/or the crime scene, defendant failed to use voir dire to discover or object to any such knowledge, and he provided no credible explanation for failing to challenge these jurors during voir dire. Thus, as in People v. Lanaux, 197 A.D.2d at 908, defendant waived his right to raise this issue for the first time after the jury had rendered its verdict.

In any event, there was no credible evidence supporting defendant's claim of an improper outside influence on the jury.

Once again, the source of this allegation was Ms. Luce. Despite having voted during deliberations to convict defendant of Manslaughter in: the Second Degree (1853) and affirming that vote in open court (1623). Ms. Luce testified that she regretted that vote and felt that the other jurors were very forceful, rude, and obnoxious to her (1852, 1855). As a result of the pressure she felt during deliberations, she wrote a letter to the judge. Nowhere in this letter does she mention any allegation that other jurors stated that they had extra-record knowledge of the crime scene (1854).

Ms. Luce later claimed in an affidavit prepared by defendant's attorneys that she had heard two jurors from Olean state that they had been in the East Side Pizzeria, the scene of the, crime (1659-60). On cross-examination, however, Ms. Luce admitted that she had told Investigator Frank on November 13, 1997 that she had merely assumed that the Olean jurors had been in the restaurant (1876-77). This was corroborated by Investigator Frank's testimony (2020). Indeed, Investigator Frank testified that when he directly asked Ms. Luce if the Olean jurors had told her they were in the restaurant, she said no (2020).

Mrs. Ruth Painter also gave a sworn statement to defendant's attorneys (1662-63). It was identical in type, font, and format to the Luce affidavit, also prepared and notarized by defendant's attorneys, and frequently using identical words and phrases from the Luce affidavit (1658-61). She, too, claimed that the Olean jurors had said that they had been to the restaurant in question (1662-63). This accusation, however, was categorically denied by the two Olean jurors. Mr. Anthony Dieteman and Mrs. Kathleen Hendrix were the only jurors from Olean (1959). Both of these defense witnesses unequivocally stated that they had never been in the East Side Pizzeria and had never told the other

jurors that they had been (1946, 195 9, 1675-77, 1678-81, 1975-76, 1991).

As this record demonstrates, there is no credible evidence that the Oleon jurors imparted extra-record information to the other jurors about the crime scene. Thus, the trial court, which was in the best position to assess the credibility of the witnesses who testified at the hearing (see, e.g., People v. Prochilo, 41 N.Y.2d 759, 761 [1977]), properly rejected defendant's claim.

Even assuming, arguendo, that extra-record facts were considered in the deliberations, the trial record contains an abundance of properly admitted evidence demonstrating beyond cavil that any such extra-record information was non-prejudicial. People v. Rhodes, 92 A.D.2d at 745; see also People v. Loliscio, 187 A.D.2d 172, 179 (2d Dept. 1993) ("the defendant must demonstrate not only the infiltration of unduly prejudicial information but also *** there must be a strong showing of improper influence on the jury").

Although Ms. Luce stated that her belief that the Olean jurors had been in the restaurant influenced her "in the sense that other jurors took that so that they wouldn't listen to my arguments anymore because they felt that this had to be right because, you know, they knew this had to be right" (1887), she contradicted herself during a conversation with Investigator Frank on November 13, 1997. On that date, in response to Investigator Frank's question whether her decision to convict defendant was influenced by those alleged statements, Ms. Luce said no (2022).

Moreover, the alleged extra-record facts, including the lighting of the parking lot and the size of the restaurant, came from well-documented evidence presented at trial. For example, the lighting in the parking lot was substantiated by People's

Exhibit 1, a scale drawing of the inside and outside of the pizzeria (1877, 1915, 1961, 1982). It was stipulated into evidence and denotes the location of the lights. Also in evidence are aerial photographs marked People's Exhibits 2, , and 4, indicating where light standards were (1882-85, 1916-17, 1964, 1980-82).

Similarly, the size of the restaurant was well established at the trial. For example, Pam Brochu indicated that items on the interior of the restaurant were closer together than they seemed in Exhibit 1 (1357-58). Robert Doxey described how sitting at a table, he was less than an arm's length away from someone sitting at the counter (1187). Dale Cummings described it as "a small restaurant" (880). Several photographs, People's Exhibits 5, 6, and 7, depicting the interior of the restaurant, were introduced into evidence at trial (958). People's Exhibit 1, the scale drawing previously described, showed the restaurant's interior measurements. It, too, was introduced into evidence at the trial (877). Most significantly, none of the jurors who testified at the hearing claimed that they relied on anything but the trial exhibits and the testimony during their deliberations (Painter: 1920; Dieteman: 1959, Hendrix: 1985). Indeed, even Ms. Luce acknowledged that her knowledge of the lighting and the size of the restaurant came from the exhibits (1885, 1881).

The law does not prohibit jurors from applying their everyday experience and common sense to their deliberations. People v. Brown, 48 N.Y.2d at 393-94. Nor can it be said that the Olean jurors' knowledge, known to the defendant, was derived from a contrived experiment or test orchestrated to corroborate a particular witness's testimony. See, e.g., People v. Stanley, 87 N.Y.2d 1000 (1996); People v. Thomas, 184 A.D.2d 1069 (4th Dept. 1992). Regardless, the hearing record established that the Olean jurors, despite their knowledge of the outside of the crime scene, relied solely on the exhibits and the testimony in their

deliberations. Because defendant has wholly failed to prove that any juror did otherwise, he cannot prevail on this claim in this Court.

In a particularly specious argument, defendant, reiterating his 330 arguments, claims that the jury improperly inserted extra-record evidence of his character and education into their deliberations, and seeks to overturn his conviction on that basis. He claims, for example, that Mrs. Hendrix knew defendant's sister, and knew that he was from a good family and "should know better." Not only were these allegations refuted by Mrs. Hendrix (1978-79, 1984-85), but a review of the record reveals that it was defense counsel himself who stated that defendant coached a football team and came from a good family, and pointed out several family members to the jury, including defendant's sister (549, 864, 982-84, 983,1487). Even assuming, arguendo, there were some outside influence regarding these matters, such statements "would tend to support the defendant and cannot be considered prejudicial to him. People v. Loliscio, 187 A.D.2d 172, 179 (2d Dept. 1993) (defendant not prejudiced by rumors that rape victim was promiscuous).

Given the testimony of the two Olean jurors categorically denying ever having entered the East Side Pizzeria, the contradictory nature of the statements accusing the Olean jurors of saying they had been inside, and the numerous exhibits in evidence and testimonial references specifically describing the matters alleged in issue, the defense has wholly failed to assert a ground "which may have affected a substantial right of the defendant" as required by C.P.L. § 330.30(2). People v. Clark, 81 N.Y.2d 913, 914 (1993) (affirming denial of defendant's motion to set aside verdict).

In short, when jury misconduct is alleged, the trial judge has a duty to conduct a full investigation to ascertain if the

misconduct occurred; if it occurred, he must determine whether or not it was prejudicial; and if he concludes it was not, he must spell out his findings. United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970). The trial court did precisely this. It properly held a hearing where a full review and analysis of the facts was made. See People v. Edgerton, 115 A.D.2d 257 (4th Dept. 1985) (reversal required where the trial court failed to hold a hearing, despite evidence that juror knew of defendant's past criminal history). Thereafter, it wrote a lengthy and thorough decision denying defendant's motion and setting forth the reasons therefore. Because that decision was entirely correct, defendant's conviction should be affirmed.

## POINT FOUR

### THE TRIAL COURT DUD NOT ERR IN REFUSING TO RECUSE ITSELF FROM DEFENDANT'S C.P.L. § 330.30 HEARING (Answering Point III of Defendant's Brief).

Defendant contends that the trial court should have recused itself from the post-conviction proceedings on two grounds: that the judge was a material witness in the 330 hearing, and that the judge wrote two letters allegedly evidencing bias, long after the verdict, in response to letters: attacking the judge's integrity. Defendant further contends that, as a result of the court's refusal to recuse itself, his conviction must be reversed. These claims are without merit.

Judiciary Law § 14 is the sole statutory authority in New York for the disqualification of a judge. People v. Hornblass, 93 A.D.2d 732 (1st Dept. 1993). It states in relevant part:

A judge shall not sit as such in, or take any part in the decision of., an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree. Absent a statutory basis for disqualification, the "judge is the sole arbiter" of whether he should recuse himself. People v. Moreno, 70 N.Y.2d 403, 405 (1987); Petkovsek v. Snyder, 251 A.D.2d 1086 (4th Dept. 1998); People v. Bennett, 238 A.D.2d 898 (4th Dept. 1997); People v. Bibbs, 177 A.D.2d 1956 (4th Dept. 1991). The court's decision on this matter cannot be overturned on appeal unless it was an abuse of discretion. Moreno, 70 N.Y.2d at 405-06.

There is not now, nor has there ever been, a claim that there was a statutory basis requiring the trial court's disqualification. Moreover, defendant's reliance on Rules of the Chief Administrator of the Courts, Title 22, N.Y.C.R.R. §100 et seq. as statutory authority for disqualification, is misplaced. "These rules are designed to provide guidance to judges ... and to provide a structure for regulating conduct through disciplinary agencies. They are not designed or intended as a basis for civil liability or criminal prosecution." Title 22, N.Y.C.R.R. Preamble.

Nor did the court abuse its discretion in refusing to recuse itself from the 330.30 hearing. Contrary to defendant's current assertion that he tried -to call the judge to the stand during the 330 hearing, no such effort was made. At best, defense counsel speculated that he might call the judge as a witness to testify about his post-verdict conversation with juror Denise Luce: "Now we have to **perhaps** call you as a witness" (1736); "I **could** call you as someone ... as a repository what she had to say to you" (1737 [emphasis added]). Indeed, when the court directly challenged the likelihood of being called as a defense witness at the hearing,

defense counsel replied, "You never know, judge, you never know" (1739). At no time during the subsequent hearing did defendant call or attempt to call the judge to the witness stand (1996). Thus, there was no abuse of the trial judge's discretion in failing to recuse himself. See People v. Ramos, 208 A.D.2d 1052 (3d Dept. 1994) (holding that the trial court properly refused to recuse itself despite defendant's intention to call judge as a witness at a 440 hearing).

These facts bear a similarity to those in People v. Rodriquez, 14 A.D.2d 917 (2d Dept. 1961). In that case, the defendants actually called the judge as their witness in a coram nobis hearing. The judge declined to testify or recuse himself. The Appellate Division held that "[t]he claim ... that the judge is a material witness must be made in good faith and must be based on fact ... Here, the record discloses neither." Id. at 919 (citations omitted). The Court went on to note that the District Attorney would have been justified in objecting to the judge's testimony. In the instant case, any testimony by the trial court judge would also have been met with objections by the People since such testimony would have been inadmissible as either hearsay. improper impeachment, or improper bolstering. Thus, as in Rodriguez, there was no error in the trial judge's refusal to recuse himself from the 330.30 hearing.

This is not the first time that defendant's attorney has attempted to disqualify a judge, claiming that the judge would be a potential witness. In Matter of Cambria v. Adams, 161 A.D.2d 1180 (4th Dept. 1990), an Article 78 proceeding, this Court rejected defense counsel's attempt to have that trial judge removed, despite the fact that the judge could have been a witness in a hearing on a motion to dismiss due to grand jury irregularities. This, in part, led Judge Himelein to reject

defendant's motion in the instant case, suggesting that it had not been made in good faith (1809, 2044).

Defendant's contention that the court's contact with Ms. Luce required recusal is equally, without merit. The trial court specifically addressed whether it was influenced in any manner by: its meeting with Ms. Luce. In its May 28, 1998 decision, made before the 330 hearing was held, the court stated, "I recall little, if any, of the specifics of Ms. Luce's complaints ... [T]he court made no determination of Ms. Luce's veracity at the time of our meeting, nor was there any reason to do so ... There was nothing to indicate that anything she said to me would ever be the subject of any type of hearing. Her credibility, if it is to be judged, will be judged on the basis of a subsequent hearing, nothing more and nothing less" (1809-10).

In its post-330 hearing decision of December 10, 1998, the court reiterated that "any determination this court has made of Ms. Luce's credibility is based solely on the testimony at the hearing" (2044). A similar situation was faced by a trial court in People v. Childs, 247 A.D.2d 319 (1st Dept. 1998). There, the defendant moved to recuse the trial court from presiding over a subsequent reconstruction hearing regarding jury selection because the court had specific recollections of the voir dire. The judge refused to disqualify himself. The Appellate Division, in upholding the trial court's decision, wrote that the judge's "written decision made clear that the credibility issue raised by defense counsel ... would not have affected his credibility findings or legal conclusions." Id. at 324. The court's written decisions in this case likewise indicate that the court was not affected by its post-trial conversation with Ms. Luce.

Defendant in the instant case counters the court's unequivocal statements regarding its meeting with Ms. Luce with

speculation that the court may have been "swayed" by this meeting. He fails, however, to make any actual showing of improper influence during the hearing or in the court's decisions. Indeed, the record of the testimony of Ms. Luce and the other juror in question, Ms. Painter, amply supports the court's basis for its decision to give no credibility to either witness (2045-49). Defense counsel apparently also realized the incredibility of his witnesses at the hearing, since after they testified, and faced with a motion by the People to dismiss for failure to meet his burden, defendant called the People's two witnesses (1927).

Likewise, defendant's contention that the court should have recused itself because of bias, as allegedly evidenced by two letters the court wrote several weeks after the verdict, finds no support in the record. Indeed, the record reveals no ruling that evidences such bias. Defendant himself wholly fails to identify any part of the proceedings that demonstrated the court's bias against him. Thus, this claim too must fail. See Yannitelli v. D. Yannitelli & Sons Construction Co., 247 A.D.2d 271 (1st Dept. 1998); Solow v. Wellner, 157 A.D.2d 459 (1st Dept. 1990) ("Unless the moving party can point to an actual ruling which demonstrates bias, which petitioner cannot do here, an appellate court will not substitute its discretion for that of the trial court."); see also People v. Hoehne, 203 A.D.2d 480 (2d Dept. 1994).

Even when a court has made statements indicating bias to the respective attorneys, outside the presence of the jury, there is no statutory disqualification and "the trial court, in the exercise of its 'personal conscience', is the 'sole arbiter' of a claim that recusal is warranted." Burdick v. Shearson American Express Inc., 160 A.D.2d 642, 643 (1st Dept. 1990) (citations omitted). Even where a trial court commented before a hearing about a question of law it was about to determine, recusal was not warranted. People v. Thompson, 158 Misc.2d 397 (Queens

County), aff'd, 222 A.D.2d 156 (2d Dept.), aff'd, 90 N.Y.2d 615 (1993). In Conti v. Citrin, 239 A.D.2d 251 (1st Dept. 1997), the presiding IAS justice was a subpoenaed witness against the plaintiff for an alleged assault that took place in the justice's robing room. Despite this apparent conflict. recusal was not required. Once again, the court was the sole arbiter of discretion and absent a showing of an "actual ruling which demonstrates bias", the justice's decision would not be disturbed. Id. at 679; see also Matter of Estates of Smith v. Tryon, 84 A.D.2d 644 (3rd Dept. 1981).

Each and every one of defendant's contentions supporting recusal set forth in his brief has been addressed by the court below (1809-10, 2043-44). Absent any statutory basis for disqualification, the decision to grant or deny the recusal motion was left to the good judgment and conscience of the trial court. As defendant has failed to show an abuse of that court's discretion in denying defendant's motion for recusal, there is no merit to his appellate claim.

Finally, assuming, arguendo, that there had been an abuse of discretion, the only relief defendant would be permitted would be another 330 hearing. not reversal of his conviction. The People submit that there was nc abuse of that discretion. Accordingly, defendant's conviction should be affirmed.

## POINT FIVE

## DEFENDANT'S SENTENCE IS NOT UNDULY HARSH AND EXCESSIVE IN LIGHT OF THE GRAVITY OF THE OFFENSE.

Defendant's sentence for his conviction for Manslaughter in the Second Degree is not unduly harsh and excessive in light of

his role in the death of Kevin King, his lack of remorse, and his prior criminal record. Additionally, defendant's assertion that he received a harsher sentence to penalize him for proceeding to trial, as evidenced by his co-defendants' sentences after pleas, is without merit. Thus, the decision of the sentencing court should not be disturbed.

Sentencing is primarily a function of the trial court, People v. Felix, 58 N.Y.2d 156, 161 (1983). However, this Court may modify the sentence "as a matter of discretion in the interest of justice." C.P.L. §470.15 (3). In order to exercise this power, this Court must determine not only that the sentence imposed was harsh and excessive, but also that there is some demonstrated "need to impose a different view of discretion than that of the sentencing Judge." People v. Suitte, 90 A.D.2d 80, 86 (2d Dept. 1982). Such a need will arise only if the sentence was "unduly" harsh and excessive. C.P.L. §470.15 (6)(b); People v. Thompson, 60 N.Y.2d 513, 519 (1983). The Court of Appeals has stated that "the determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of the penal sanction, i.e., societal protection, rehabilitation and deterrence." People v. Farrar, 52 N.Y.2d 302, 305 (1981).

In this case, defendant's sentence is not unduly harsh and excessive, but is appropriately tailored to suit his involvement in the crime. On the night of Kevin King's death, defendant was the first to incite the large group to violence with his belligerent question, "Are we going to take this shit from them, let's go get them" (1339). He was also the first to leave his table in response to the challenge issued by Steve Hellwig (1021, 1031, 1377, 1419, 1478). The waitress at the restaurant testified that she attempted to stop defendant from going outside for fear that the rest would

follow and that a huge fight would ensue (1420). Defendant ignored her request, pushed her aside, and proceeded out the door (1420). Defendant's aggressive behavior and inflammatory statements thus laid the foundation for the deadly outcome that night.

Further, the trial court has already exercised leniency in sentencing defendant, and he is entitled to no further leniency from this Court. While defendant could have received a sentence with a maximum of fifteen years (Penal Law § 70.00[2][c]), the sentencing judge carefully evaluated the particular circumstances of this case, and, in exercising his discretion, chose to sentence defendant to an indeterminate sentence having a maximum of only twelve years and a minimum of four years. This was despite the court's statement, prior to trial, that "if these people had done what they were accused of doing and if they were convicted, I would probably give them the maximum sentence of whatever they were convicted of, absent some negotiated sentence on their part" (2142).

In making his sentencing determination, the court was guided by defendant's role in the violent attack on Kevin King. The court concluded that "it appears from the evidence I heard that if Mr. Reynolds had simply sat there and not said a word, that this whole incident wouldn't have happened ... that is truly the impression I got from sitting through the trial" (2142). The court appropriately examined the voluminous sentencing memorandum prepared by defense counsel, and read many letters in support of the defendant. It then, correctly, weighed those factors against the severity of the crime charged and defendant's participation in it. The court observed that "the loss of a human life in this case . that's the thing I find most overpowering" (2142). The nature of the crime, like defendant's circumstances, is a proper consideration to be weighed in determining an appropriate

sentence. People v. Martinez, 124 A.D.2d 505, 506 (1st Dept. 1986). Thus, the sentencing court did not abuse its discretion when imposing its sentence upon John Reynolds. Consequently, the sentence should not be disturbed.

Defendant nonetheless claims that his sentence was unduly harsh and excessive when compared with the sentences of his co-defendants. He improperly uses these comparisons to support his assertion that he is being penalized for exercising his right to a jury trial. He erroneously manipulates these comparisons, with virtually no effort to establish the weight of the proof against the co-defendants or their relative culpability. The so-called sentencing discrepancies, however, are justified by the fact that the co-defendants accepted plea bargains. The Court of Appeals aptly noted that "the plea bargaining process will almost necessarily involve offers to moderate sentences that would ordinarily be greater ... [and] that sentences imposed after trial may be more severe than those in connection with a plea." People v. Pena, 50 N.Y.2d 400, 411 (1980); see also People v. Walker, 234 A.D.2d 962, 964 (4th Dept. 1996) (sentences offered in plea negotiations are frequently more lenient than those imposed after trial). Moreover, "trial afford[s] the court an opportunity to get the background of the defendant and his involvement with the law," [and] thus imposition upon the defendant of a sentence harsher than that imposed upon co-defendants who pled guilty is not improper. People v. Williams, 51 N.Y.2d 803, 803 (1980); see also People v. Givens, 181 A.D.2d 577 (4th Dept. 1992). Accordingly, the disparity between defendant's sentence after trial and his co-defendants' sentences after they pled guilty was justified, and the sentence should not be interpreted as a penalty for going to trial.

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qually misplaced is defendant's contention that a lighter sentence is

warranted because he lacked a significant criminal record prior to the instant arrest. This Court's leniency has been documented when there is a complete lack of criminal history prior to the commission of the offense at issue. See People v. Shughart, 247 A.D.2d 826 (4th Dept. 1998); People v. Sinclair, 231 A.D.2d 926 (4th Dept. 1996). Any leniency toward this defendant on this basis, however, is unwarranted. The Sandoval hearing during the trial revealed a conspicuous criminal past as defendant's prior incidents of recklessness and aggression were introduced to the court. In 1990, defendant interfered with an arrest being made by a police officer (372). He was arrested for obstruction of governmental administration in the second degree, and subsequently pleaded guilty to disorderly conduct (372).

The underlying facts of defendant's second conviction reveal that he hit a bicyclist while driving his vehicle under the influence of alcohol. Defendant sped off without stopping, but was intercepted shortly thereafter for speeding (371-372). Defendant was initially charged with leaving the scene of an accident and Driving While Intoxicated, and later pleaded guilty to the DWI (372).

Moreover, by the time of sentencing for the manslaughter conviction, defendant had additionally acquired a felony conviction for driving while intoxicated (2142). Defendant's repeated criminal transgressions displayed both a disregard for the law and an indifference to the welfare and safety of others, which culminated in defendant's reckless behavior that led to the untimely death of Kevin King, just one week before Kevin's birthday. In short, defendant demonstrated an inability to maintain a law-abiding lifestyle, and his sentence was proper in light of his criminal record.

Finally, defendant insists that his sentence is harsh and excessive in light of his remorse. This claim is unfounded. Defendant's own words at sentencing do not express remorse, but rather an inability to accept responsibility for his actions. When given his absolute right to address the court and express his true feelings, defendant's only statement was, "Your Honor, I would like to tell Randy King's family I'm sorry Kevin King died but I didn't have anything to do with his brother's death. Your Honor, I hope you don't penalize me for taking it to trial knowing I was innocent. I just hope that you take that into consideration. That's all I have to say" (2141). This is hardly a contrite expression of concern for the deceased victim. Remorse is typically evidenced by some form of self-reproach for "participation in the crime" rather than by the denial of responsibility. People v. Sinclair, 231 A.D.2d at 926. Defendant failed to show any semblance of remorse and thus should not be entitled to any reduction in his sentence.

For all of these reasons, the trial court properly exercised its discretion in determining an appropriate sentence, and the decision of that court should be affirmed.

## POINT SIX

## DEFENDANT'S GUILT WAS PROVEN BEYOND A REASONABLE DOUBT BASED ON THE EVIDENCE AND THE CREDIBLE TESTIMONY OF THE WITNESSES, AND THE VERDICT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

The evidence proved that defendant intentionally aided his co-defendants to recklessly engage in a vastly one-sided fight that resulted in the death of Kevin King. Nonetheless, defendant claims

that the People did not prove his guilt beyond a reasonable doubt and that his conviction was against the weight of the evidence. Defendant's claim is without merit.

When a conviction is reviewed for sufficiency of the evidence, it must be affirmed if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original); People v. Contes, 60 N.Y.2d 620 (1983); People v. Andersen, 118 A.D.2d 716, 717 (2d Dept. 1986). In other words, the jury's determination should be accorded great weight on appeal and should not be disturbed unless clearly unsupported by the record. People v. Garafolo, 44 A.D.2d 86, 88 (2d Dept. 1974); People v. Williams, 222 A.D.2d 468, 469 (2d Dept. 1995). Moreover, the People are entitled to every reasonable inference that can be drawn from the evidence. People v. Ford, 66 N.Y.2d 428, 437 (1985).

Here, the evidence more than sufficiently established the elements of the charged crime. A person is guilty of Manslaughter in the Second Degree under Penal Law § 125.15(1) when he recklessly causes the death of another person. A person acts recklessly with respect to the death of another when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct a reasonable person would observe in the situation. Penal Law §15.05(3).

In this case, viewed in the light most favorable to the People, the evidence adduced at trial was sufficient to establish defendant's guilt beyond a reasonable doubt. Thus, the determination of the trier of fact should not be disturbed.

Specifically, the People proved that two groups, one consisting of three people and another consisting of ten -- including defendant -- were eating at the East Side Pizzeria in the early morning hours of October 23, 1994. Tensions mounted as insults were directed at the small group by members of the large group (903, 1156-57). Defendant went back and forth between the two groups, telling the three that he was calming down his friends, and then telling the large group that the three were "skuzbags" (1337-38). The large group became more agitated (1367-68). As he left, Steve Hellwig, a member of the small group, issued a challenge to the large group to go out and settle things "right now" (Hellwig: 477; Brochu: 872, Wheeler: 952). In response, defendant instigated his friends, stating either "Are we going to take this shit?" or "Are you going to take this shit?" (Hollamby: 1005; Shawn Appleby: 1097; Shane Appleby: 1136) or "Are we going to take this shit from them, let's go get them" (Brochu: 1339). Given the tense atmosphere that night,, defendant knew or should have known that his comments would precipitate a physical altercation, and he nonetheless disregarded that risk.

In fact, defendant continued to elevate the level of confrontation. The first person out the door after Hellwig's challenge to fight was defendant (Seeley: 910, 938; Bedow: 565; Wheeler: 952.- Hellwig: 479). Defendant pushed the waitress out of the way when she tried to stop him. She tried to stop him because she knew that his leaving would result in a huge fight in the parking lot (1420).

This was an "unfair" fight between the two groups (Shawn Appleby: 639; Bedow: 1033). Outside, Kevin King was immediately knocked down and out by Shawn Appleby (Shawn Appleby: 632; Shane Appleby: 673 ). Kevin King never got up again (Shawn Appleby: 638, 673). The fight between the large group and the small group culminated in a large fight by Jack

Doxey's truck (Brochu: 879-880; Wheeler: 955, 956). Kevin King was at the bottom of that fight (Wheeler: 958; Seeley: 920). During that fight, Kevin King was being kicked so hard that his red and black flannel shirt was "fluffing up like a pillow" (J. Doxey: 697). Everyone by the Doxey truck was fighting (Seeley: 917; Wheeler: 958, 964). Defendant was in that group (Wheeler: 957, 959; Shawn Appleby: 653-654). Defendant placed himself exactly at the place where this fight occurred (People's Exhibit 39 at 1229).

If everyone in a group was fighting, and defendant was in that group, then the jury rationally found that he was directly involved in the fight. There is no other inference the jury could have drawn. Defendant's act of fighting, regardless of with whom, proves that he was intentionally aiding a group who recklessly caused the death of Kevin King. Indeed, it is uncontroverted that the victim died as a result of the injuries he sustained in this fight.

Defendant claims that this evidence was legally insufficient to establish anything more than his mere presence at the pizzeria, that he may have said "are you going to take this shit?", that he may have been the first person out the door after the challenge, and perhaps that he was present near the fight. Defendant is wrong, as the evidence established that he was far more culpable than he will admit.

Defendant was witnessed in the restaurant getting his friends agitated as he "played both sides" by going between them and the three men at the counter (Brochu: 1337-38, 1367-68; Hellwig: 1017-18). It was defendant who first laid hands on anyone in the restaurant in an aggressive manner, when he pushed Mrs. Wheeler aside and headed towards the door after the victims left (Wheeler: 1420). The true peacekeepers in the restaurant tried

to stop him and his friends who followed, knowing that defendant's actions would result in a fight in the parking lot (Bedow: 1032; Seeley: 1379; Wheeler: 1420). Thus, there is no merit to defendant's appellate claim that the evidence of his guilt was legally insufficient.

As to the weight of the evidence, an analysis of the evidence adduced at trial amply supports the verdict. People v. Bleakley, 69 N.Y.2d 490 (1987). In making a weight of the evidence determination, the Court is not limited to the legal test, but must, instead, examine all of the credible evidence and, if a different finding would not have been unreasonable, the appellate court must "weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony." People v. Bleakley, 69 N.Y.2d at 495 (quoting People ex rel. MacCracken v. Miller, 291 N.Y. 55, 62 [1943]). Even under this analysis, however, the Court must give great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor, and must be careful not to substitute itself for the jury. People v. Bleakley, 69 N.Y.2d at 495. In this case, the testimony of the People's witnesses was credible and consistent. Significantly, defendant never even attacks the credibility of any of the People's witnesses. As a result, the verdict was not against the weight of the evidence.

Contrary to defendant's claim (Defendant's Brief at 64), Pam Brochu did not conclusively establish that defendant was not part of the group punching and kicking the downed Kevin King. Indeed, Ms. Brochu testified that less than two days after she witnessed the fight near the Doxey truck, she identified a dark-haired man in a dark shirt as having kicked Kevin King in the ribs (1345-46). A picture of defendant and his friends taken earlier on the night of the attack was introduced into evidence and

established that defendant was the only person who matched that description (Shawn Appleby: 1078; People's Exhibit 33 at 1078).

Nor is there any merit to defendant's claim that no one saw him actually strike, punch, or kick Kevin King. The direct evidence proved that defendant was fighting alongside his co-defendants (Wheeler: 957, 959; Shawn Appleby: 653-654). Defendant placed himself exactly at the place where this fight occurred and at the spot where Kevin King's body lay at the end of that fight (People's Exhibit 39 at 1229). The only thing that was happening at that place was the fight that led to King's death (Seeley: 917, Wheeler: 958, 964). Not one person, not even defendant's only witness, corroborated defendant's assertion that he was standing at the corner of parking lot, uninvolved.

In sum, the testimony of the People's witnesses was consistent and credible, and proved defendant's guilt of Manslaughter in the Second Degree beyond a reasonable doubt Moreover, the jury's verdict was not against the weight of the evidence. Defendant's conviction should therefore be affirmed.

## CONCLUSION

For all the reasons set forth above, defendant's judgment of conviction should be affirmed.

Respectfully submitted,

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August 27, 1999

To be Argued by:
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Estimated Time for Argument:
20 Minutes

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STATE OF NEW YORK
SUPREME COURT
APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

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PEOPLE OF THE STATE OF NEW YORK,

*Plaintiff/Respondent,*

vs.

JOHN L. REYNOLDS,

*Defendant/Appellant.*

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Cattaraugus County Indictment No. 95-168

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# REPLY BRIEF FOR APPELLANT

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## PRELIMINARY STATEMENT
## and
## STATEMENT OF FACTS

Appellant relies on the Preliminary Statement and Statement of Facts contained in his principal brief.

## POINT I

## THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE MORAL CERTAINTY STANDARD IN A WHOLLY CIRCUMSTANTIAL CASE AND ITS FAILURE TO PROVIDE EVEN THE MOST MINIMAL DEFINITION OF CIRCUMSTANTIAL EVIDENCE REQUIRES REVERSAL OF APPELLANT'S CONVICTION AND THE GRANTING OF A NEW TRIAL

Respondent counters appellant's challenge that the trial court committed reversible error in refusing to instruct the jury on the moral certainty standard by simply repeating its conclusive opinion that certain proof adduced at trial constitutes direct evidence obviating the need for an instruction regarding moral certainty. The People's response betrays their basic misunderstanding -- or tactical ignorance -- of the nature of circumstantial evidence and the characteristics which distinguish it from direct evidence.

Repeatedly mislabeling evidence does not change its essential character; if, in order to reach a conclusion of guilt, it is necessary to draw an inference from certain proof, that evidence is circumstantial in nature no matter that the evidence may be the product of direct observation. Given that none of the evidence offered against appellant could establish his guilt of the crime of manslaughter in the second degree without the aid of intervening inference, it was incumbent upon the trial court to properly instruct the jury concerning the care which must be taken in evaluating such evidence and the permissible manner in which inferences may be drawn from the proof. Appellant did not receive the benefit of these

critical protections (indeed, the jury was not given even the most rudimentary definition of circumstantial evidence) and was, consequently, deprived of his right to a fair trial before a properly instructed jury of his peers.

Respondent has pointed to certain proof which it maintains is direct evidence of appellant's guilt: (1) appellant was present inside the restaurant and "was instrumental in elevating the level of tension between the victim's group of friends and his own group" (Respondent's brief at p.15); (2) appellant allegedly "precipitated" the fight in the parking lot by saying, inside the restaurant, something to the effect of "Are we going to take this shit?" or "Are you going to take this shit?"; (3) some witnesses testified that appellant was the first person out the door; and (4) appellant was in the area where the fight involving Kevin King was occurring. Even accepting the prosecution's self-serving characterization of the evidence as true, none of these evidentiary items constitutes direct evidence which would relieve the trial court of its obligation to instruct the jury on the application of the moral certainty standard.

The simplest, and most understandable, explication of the difference between direct and circumstantial evidence has been offered by Professor Fisch:

> All evidential proof is accomplished as a result of one or more inferences to be drawn from the evidence to the facts in issue. If the only inference involved is one from the assertion of the fact to the truth of the matter asserted, the evidence is testimonial, or as it is sometimes termed, direct. But if, in order to assert a proposition as true or probable it is necessary to draw any other inference, then the proof is circumstantial.

Fisch on New York Evidence, Section 161 (2d Edition).

Caselaw examples of direct evidence are legion. For example, in People v. Battle, 160 A.D.2d 948, 554 N.Y.S.2d 670 (2d Dept. 1990), defendant's conviction for criminal possession of a weapon in the third degree was affirmed in light of testimony from two police officers who testified to seeing defendant drop a gun onto a pile of building rubble as they approached. The Second Department underscored that this was direct evidence of defendant's possession of a weapon and rejected the contention that the trial court should have charged the moral certainty standard of proof. Notably, the Appellate Division explained, "Where the evidence offered to prove an essential element of the crime, here criminal possession of a weapon, was by someone with first-hand knowledge, and from whose testimony, assuming its truth, no inferential steps need be drawn, it is properly considered to be direct evidence." Id. at 949.

Another Second Department decision, People v. Lu, ___ A.D.2d ___, 687 N.Y.S.2d 164, dealt with two common types of direct evidence in rejecting the defendant's claim that the case against him was wholly circumstantial. There, the defendant not only admitted to a detective that he participated in the robbery, kidnapping and guarding of the victims, one of the victims identified him as her sodomizer. Consequently, the Appellate Division found the trial court's refusal to charge moral certainty to be proper. See also, People v. Pagan, 177 A.D.2d 604, 576 N.Y.S.2d 311 (2d Dept. 1991) [victim's identification of the defendant as the person who shot him was direct evidence].

The necessity of a moral certainty instruction was also rejected in People v. Abassi, 199 A.D.2d 183, 605 N.Y.S.2d 295. There, the First Department found a mixed case of direct and circumstantial evidence in light of testimony concerning a meeting "in which defendant himself proposed the unlawful scheme." Id. Similarly, in People v. Wilson, 170 A.D.2d 961, 565 N.Y.S.2d 663 (1991), this Court ruled that defendant's actions in supplying the

codefendant with a gun and ordering him to shoot the victims constituted direct evidence obviating the need for instruction on the moral certainty standard of proof. See also, People v. Wallace, 159 A.D.2d 1022, 552 N.Y.S.2d 723 (4th Dept. 1990) [inasmuch as the trial proof revealed that defendant gave a full confession to a fellow inmate, moral certainty charge was not required]; People v. Taxiarhopoulos, 172 A.D.2d 783, 569 N.Y.S.2d 156 (2d Dept. 1991) [moral certainty instruction not necessary in light of testimony that the defendant grabbed and held taxi driver while his companion stole the cab].

Each of these cases exemplifies direct evidence as it is normally defined in its relation to circumstantial proof:

> Direct evidence is that which tends to establish one or more of the principal facts in issue without the intervention of evidence of any other fact . . . Circumstantial evidence is evidence of a collateral fact, that is, of a fact other than of the fact in issue, from which, either alone or with other collateral facts, the fact in issue may properly be inferred.

Richardson on Evidence, Prince 10th Edition, Secs. 3, 145, pp.2, 116. Examined in this context, the proof respondent asserts as direct evidence of appellant's guilt is clearly anything but direct.

For instance, assuming, *arguendo,* that appellant's conduct while inside the restaurant "elevated the level of tension" between the two groups of young people, the fact or facts underlying this conclusion are wholly collateral in nature. Standing on its own, such evidence does not establish any element of the crime of manslaughter in the second degree; in order to consider it as proof of guilt, one must *infer* a culpable state of mind and do so among a number of competing innocent inferences. Given the young age of most of those involved in this unfortunate incident, can goofing

around or simple insensitivity or braggadocio be excluded as permissible inferences? Appellant submits that a fair reading of the record compels the drawing of a non-culpable inference.

A similar analysis applies to the claim that appellant's alleged statement, "Are you going to take this shit?" or "Are we going to take this shit?" Even assuming that John Reynolds made this comment -- certainly a subject of conflicting testimony at trial and in no way conceded by appellant -- the mere utterance of such words does not directly establish any principal fact. The meaning of the statement depends on the inference one draws from it. As appellate counsel emphasized during the Article 330 proceedings, there are at least three ways to manifest "not taking this shit": (1) get out of there so you don't have to take this shit anymore; (2) say something back to them so you are not taking this shit, you're giving it back; and (3) kick the shit out of someone (1753). In order to give the comment meaning, you must infer what was meant—again, among competing innocent inferences. In the absence of an inferential process, the statement exists only as a collateral fact without direct evidential value. Cf., People v. Guidice, 83 N.Y.2d 630, 612 N.Y.S.2d 350 (1994) [where the Court of Appeals, in an assault prosecution, concluded that the trial evidence was not wholly circumstantial given that "Anthony Guidice's statements, among others, that he "sent two guys to break [Meyer's] legs', and that he 'put him in the hospital', amount to acknowledgments that he solicited, requested, or commanded the attack with intent to cause physical injury under Penal Law Section 20.00"].

Further, in order to clear up any potential ambiguity created by the artful phrasing of respondent's brief (at p.16), while witness Pamela Brochu did testify that she heard someone say, "Are we going to take this shit from them, let's go get them," she pointedly did not attribute the statement to John Reynolds even though he had been identified to her before the statement was made (1338-39).

Moreover, even assuming that this specific statement -- which no one else testified to hearing -- was, in fact, made, it was not direct evidence of defendant's guilt of manslaughter in the second degree. In order to use this statement as evidence of appellant's culpability for the crime of which he was ultimately convicted, the jury would have to infer that appellant uttered those specific words and then infer the requisite reckless mental state.

Not surprisingly, respondent continues to emphasize the theme it repeatedly advanced below and one which was accepted by the trial court: that direct evidence of appellant's guilt can be found in his leading of a "charge" out of the restaurant. Respondent specifically quotes the trial court's conclusion that, "[g]iven the hostilities that had occurred inside, a reasonable jury could consider that conduct reckless. Had defendant said nothing, it is likely nothing would have happened" (1811-12).

Appellant submits that not only are the circumstances underlying the conclusion that appellant led a "charge" out the door wholly circumstantial, but also that the court's order in this respect amounts to no more than rank speculation as to what would have happened "had defendant said nothing." The fact of the matter is that there was conflicting testimony as to who exited the restaurant first after Steven Hellwig issued his challenge and, if one credits the testimony that appellant left first, that collateral fact standing alone establishes nothing but the physical process of his leaving the restaurant. If an inference is not drawn from the combination of appellant's alleged statement and his supposedly being first out the door, the only evidential value of such testimony is as an accounting of his physical conduct. The only way such proof might be considered evidence of guilt is through the drawing of the inference that, by his conduct, appellant caused the fight and that in so doing he was aware of and consciously disregarded a substantial risk that his particular conduct would cause Kevin King's death. Accordingly, such evidence does not constitute direct evidence

obviating the need for a jury instruction on the moral certainty standard of proof. Indeed, the need for guidance on the proper drawing of inferences is apparent from trial testimony indicating a very plausible and reasonable competing inference to be drawn from appellant's exiting first from the restaurant: he intended to simply talk to Steven Hellwig, his sister's brother-in-law, as he told Gayle Wheeler (1419-20).

Finally, respondent's characterization of the evidence concerning the fight outside the restaurant and the evidentiary significance thereof require some comment. Contrary to the prosecution's representations, Gayle Wheeler and Shawn Appleby did not specifically identify John Reynolds as one of the individuals in the group fighting over Kevin King as he lay on the ground. Rather, Wheeler testified merely that she saw a "bunch of people kinda crowded all together and down on their knees and on their feet and saw fists flying and feet swinging" in front of Jack Doxey's truck. However, she could not tell how many people were in "the bunch" and could not see their faces (1421-23, 1431). Significantly, Wheeler saw appellant only after someone yelled that the police were coming and people started running away from the truck. She assumed that Reynolds had been with the group of people fighting in front of Doxey's truck simply because she saw him running away from the area of the fight. Wheeler did, however, remain steadfast in her testimony that she never saw appellant punch, strike or kick anyone and, in fact, did not see him anywhere during the fight (1423-28).

Similarly, a fair and accurate representation of Shawn Appleby's testimony demonstrates that he explained only that he saw appellant in the area of the fight, but did not see him hit, strike or punch anyone at any time or encourage or assist anyone else in doing so (111-12). Moreover, the People take unfair liberties with the evidence when they represent to this Court that there was testimony adduced at trial that appellant had been observed kicking

Kevin King. The truth of the matter is that while Pamela Brochu described one of King's assailants as having worn a dark shirt and a photograph of appellant and his friends taken that night showed appellant wearing a dark shirt, Shawn Appleby also described himself as wearing a dark khaki shirt in the photograph and, when asked by defense counsel to look at the photograph during cross-examination, Brochu admitted that it depicted a man in a dark shirt and jeans whom she did not know (1077-79, 1344-46, 1355-56). Even more significantly, the prosecution conveniently avoids dealing with the incontrovertible fact that Pamela Brochu unequivocally testified at trial that she saw exactly five people in the group fighting over Kevin King: Brian Mooney, Keri Haggerty, Shawn Appleby, Shane Appleby and Matthew Sweatland. John Reynolds was not one of them and Brochu admitted that she did not see appellant at any time during the fight. She saw him only after the fight had ended and he was getting into his truck (1342-43, 1350-55, 1360-64, 1369). Perhaps most telling are Brochu's own words on direct examination:

> Q: Can you say that the Defendant himself was participating in that fight at that time on October 23rd of 1994?
>
> A: No I cannot.

(1350).

An accurate reading of the record establishes that appellant was merely present in the vicinity of the fight involving Kevin King, a fact he acknowledged to the police. His mere presence at the scene of Kevin King's death, even with knowledge of its perpetration, did not make appellant accessorily liable. People v. LaBelle, 18 N.Y.2d 405, 276 N.Y.S.2d 105 (1966).

The circumstances of the case at bar resemble several other cases which have been found to rest on entirely circumstantial foundations. For example, in People v. Cabey, 199 A.D.2d 197, 605 N.Y.S.2d 297 (1st Dept. 1993), the defendant was charged and convicted under Penal Law §20.00 as an accomplice in the attempted murder of Shanequa Fanning. In that case, defendant Cabey spent an evening with Ms. Fanning and her boyfriend, Dwayne Henry. During the course of the evening, Henry and Fanning began to fight. The argument escalated to the point where Henry assaulted and then raped Fanning. Cabey was present during the altercation, but did not take part. Id. at 198.

Later in the evening, Henry pulled out a handgun and asked Cabey where he could put it. After Cabey told him to put it under a chair cushion, Henry angrily exclaimed, "we're going to fuck this bitch up." When Cabey's cousin arrived at the apartment, Cabey lifted the chair cushion and said, "look what I got." Id. at 198-99.

A short time later, defendant Cabey told his cousin, "we're leaving now, there might be some problems," and then left the apartment with Fanning and Henry. As Henry continuously shoved Fanning down six flights of stairs, Cabey followed close behind. When Fanning refused to kiss Henry at the tenth floor landing, Henry pulled out a handgun and shot her five times in the stomach. Henry and defendant Cabey fled together immediately after the shooting, only to return together moments later so Henry could shoot Fanning in the back two more times. Cabey and Henry then escaped separately to Washington, D.C. where they were ultimately arrested. Id.

Noting that the case against Cabey was entirely circumstantial, the First Department ruled that the proof fell far short of that required to establish Cabey's intent to kill and did not demonstrate any actual participation by him in the attempt on Fanning's life. In light of the absence of any proof that there was an

agreement between Cabey and Henry to harm Fanning, the Appellate Division concluded that, "the record is at least equally consistent with Henry's commission of a spontaneous act of homicide in the course of a violent argument with his former girlfriend at the height of which, and just prior to the shooting, she refused to kiss him." Id. at 200.

Similarly, in People v. Brian, 84 N.Y.2d 887, 620 N.Y.S.2d 790 (1994), the Court of Appeals found that the trial court had erred in refusing to give a circumstantial evidence charge where the People's entire case was based on circumstantial evidence. In Brian, although defendant admitted he lived in the apartment where the drugs and weapons had been found and had also been observed there, such evidence was deemed wholly circumstantial with respect to his dominion and control over the contraband found by police. As the Court of Appeals explained:

> The direct evidence of defendant's dominion and control over the apartment, as well as the remaining incriminating evidence against him such as his flight from the premises, the gun which fell to the floor at the window through which he fled and the presence of his passport along with the weapons in the locked safe of his apartment, all required the drawing of an additional inference to establish defendant's dominion and control over the contraband and, thus, was circumstantial.

People v. Brian, supra at 889.

The circumstantial nature of the trial proof was also a critical issue in a Fourth Department case, People v. Ball, 162 A.D.2d 989, 557 N.Y.S.2d 784 (1990). There, the defendant was convicted of rape and other charges and on appeal claimed that the trial court had committed error in failing to instruct the jury with

respect to the application of the moral certainty standard. Rejecting the People's argument that semen found in the victim's vagina and observation of the defendant leaving the victim's residence constituted direct evidence of defendant's commission of the rape, this Court ruled that the rape case was entirely circumstantial and that the trial court should have charged moral certainty. Id. at 990.

The common ground of the foregoing cases is that they all involve what could be called direct observations of conditions or actions which did not rise to the level of direct evidence of the respective defendant's guilt. The defendants' presence at the crime scenes or statements made or appearance of acting in unison all required the jurors to infer guilt, not assume it. Likewise, in the instant case, appellant's purported conduct and statement inside the pizzeria, the manner of his exit from the restaurant and his mere presence near the group altercation involving Kevin King do not directly establish appellant's guilt in any way. This proof and all of the evidence offered against appellant was unmistakably circumstantial in nature and required that the jury be instructed on the process of drawing inferences and reaching a verdict utilizing the moral certainty standard.

The cases cited by respondent in support of the People's theory that direct evidence negating the necessity of a moral certainty charge was offered at trial are unpersuasive and, in fact, tend to establish appellant's position. For instance, in People v. Smeraldo, 242 A.D.2d 886, 662 N.Y.S.2d 883, lv. denied, 91 N.Y.2d 880, 668 N.Y.S.2d 579 (1997), this Court rejected defendant's argument that he was entitled to a moral certainty charge on circumstantial evidence on the ground that the complainant's observation of defendant engaged in the act of damaging her car by spraying a liquid on it was direct evidence of defendant's guilt. Appellant submits that such an obvious example of direct evidence has no bearing on the instant matter other than to highlight the dearth of any comparable proof in the case at bar.

People v. Russell, 91 N.Y.2d 280, 670 N.Y.S.2d 166 (1998), relied upon by respondents, is also inapposite. In Russell, three co-defendants engaged in a gun battle on a grassy mall in the middle of a housing complex sheltering seven thousand residents. During the course of this battle, defendant Burroughs traded challenges with defendant Russell and his partner, Bekka. Armed with automatic weapons, the three men exchanged fire, creating what the Court of Appeals termed a "zone of danger" which endangered at least twelve people in the immediate vicinity, one of whom was struck and killed by one of the many shots fired.

Russell does not present any issue concerning the nature of certain evidence as either direct or circumstantial in character, nor does it address the propriety of the moral certainty charge in light of the evidence presented at trial -- the lead issues in the instant case. Rather, Russell simply stands for the proposition that criminal liability may lie on an accessorial basis where the accused participants intentionally engage in concerted activity while simultaneously sharing the same culpable mental state. Appellant does not dispute this concept; rather, appellant maintains that none of these elements were proven by the wholly circumstantial proof in the case at bar.

While direct evidence in Russell established that each defendant intentionally engaged in potentially lethal conduct and that their concerted actions created a zone of danger which presented a grave risk of death to any innocent bystander within that zone, there was absolutely no evidence presented at the trial below that John Reynolds engaged in any life threatening conduct at any time during the course of the evening at the East Side Pizzeria. Indeed, not a single witness testified that appellant struck or kicked anyone that night (contrast this with the direct proof in Russell that each defendant had intentionally fired automatic weapons at each other on a populated public concourse). Far from supporting respondent's

arguments, the Russell decision serves to highlight the deficiencies in the proof presented against appellant.

The People's reliance on this Court's decision in People v. Abbott, 84 A.D.2d 11, 445 N.Y.S.2d 344 (1981), is equally misplaced. In Abbott, two defendants -- Abbott and Moon -- were drag racing on a residential street when Abbott lost control of his vehicle and smashed into another automobile, killing three people. The defendants were jointly indicted for manslaughter in the second degree under a shared liability theory and both were convicted of criminally negligent homicide. This Court affirmed the convictions, rejecting Moon's argument that Penal Law §20.00 liability could not be imposed on him for Abbott's malfeasance. The theory advanced by the Court in so ruling was similar to the rule underlying the Russell decision: that shared liability will lie where co-defendants intentionally engage in inherently dangerous and unlawful activities while acting with the same culpable mental state. Id. at 9.

The relevance of the Abbott decision to the present circumstances is questionable. The accessorial liability of those defendants for the three deaths caused by Abbott was demonstrated by direct evidence of their intentional involvement in an inherently dangerous and unlawful activity. Further, this Court was not asked to pass upon the applicability of a moral certainty instruction. In the instant case, however, the trial record is entirely devoid of any direct evidence demonstrating that appellant engaged in any reckless conduct creating a substantial and unjustifiable risk of death to Kevin King or shared the requisite mental state with others.

Respondent's interpretation of People v. Ozarowski, 38 N.Y.2d 481 (1976), is also suspect. The People urge that the significance of the Ozarowski decision for the purposes of the case at bar stems from the fact that a defendant who was not carrying a baseball bat and did not strike the victim was held to have the same intent and criminal culpability as the actual assailant "because he

was in the same group, and hid with the assailants before striking the victim" (Respondent's brief at p.19). Review of the Ozarowski decision, however, establishes that the proof of each defendant's involvement -- whether or not they were carrying a bat -- was far more expansive than set forth by respondent:

> The rapid, continuous and related sequence of events on the night of the assault, the planful character of the group action, the immediacy with which their response followed the initial altercations, the fact that these were discussed at the meeting from which the adventure at Nathan's took off, the fact that the defendants armed themselves with baseball bats in the expectation that their foes would use deadly knives, and the *en masse* nature of their deployment at Nathan's were all telling circumstances which illuminated the events of the night of March 2. On the basis of all this proof it is, therefore, not surprising that the Trial Judge found the conclusion inescapable that there was a common plan or scheme hatched in Miller's apartment that evening and that overt acts in furtherance of it took place. Id. at 488-89 (citations omitted).

Unlike the premeditated common scheme or plan created and deliberately carried out by the Ozarowski defendants, the evidence at appellant's trial revealed absolutely no premeditation or planning of any kind; certainly, there was no proof -- direct or circumstantial -- of any scheme hatched and carried out in concert by appellant and others. Consequently, the Ozarowski decision is readily distinguishable on its facts as well as on the questions presented in these very different contexts (no issue concerning the applicability of a moral certainty charge was raised in Ozarowski).

The People also rely on this Court's decision in People v. Lawrence, 186 A.D.2d 1016, 588 N.Y.S.2d 471 (1992). In Lawrence, one eyewitness placed the defendant walking toward the victim's car immediately before the shooting and another eyewitness testified that immediately after she heard gunshots, "she observed defendant standing next to [the victim's] vehicle holding in his hand a smoking gun." Id. Additional proof in this murder and attempted robbery prosecution established that either defendant or his accomplice yelled "where is the money?" as they approached the victim, an undercover officer. This statement was characterized as direct evidence of a robbery attempt. Id.

Lawrence is readily distinguishable from the case at bar. Although from appellant's perspective the proof of murder in Lawrence (defendant's presence at the scene walking towards the car and then being seen immediately after shots were fired holding a smoking gun) was inherently circumstantial, the evidence was of such a compelling nature as to permit of no other inference that defendant's guilt. On the other hand, in the instant case all of the evidence characterized by the People as direct evidence of appellant's guilt is susceptible of competing reasonable and innocent interpretations.

Perhaps most telling of the weakness of the People's arguments is the fact that their brief makes no attempt to address the two cases which most convincingly support appellant's challenge to the trial court's refusal to instruct the jury on moral certainty. Most notable is this Court's decision in People v. Comfort, 113 A.D.2d 420, 496 N.Y.S.2d 857 (1985) [discussed in detail in appellant's main brief], where the Court held that Larry Comfort's instructions to his brother, Joseph, that he should get a gun and put it in the car they were using did not constitute direct evidence of Larry Comfort's guilt and, as circumstantial evidence, was insufficient to establish an agreement to kill the law enforcement officers Joseph shot. In contrast with the factual situation in Comfort, it is entirely

unreasonable to argue that appellant's alleged comment inside the restaurant coupled with his possibly exiting the pizzeria first and then being present near where people were fighting over Kevin King constitutes direct evidence of his guilt of manslaughter in the second degree -- particularly when there was no evidence offered to show that appellant hit, struck or kicked anyone or solicited, procured or assisted anyone else in doing so.

Similarly, respondent's failure to address this Court's decision in People v. Mickewitz, 236 A.D.2d 793, 654 N.Y.S.2d 221 (1997), is significant inasmuch as the facts in Mickewitz, although different than those in the instant case in their specifics, mimic the circumstantial nature of the proof in the case at bar. Consequently, appellant respectfully submits that, in light of the Mickewitz holding that the facts that (1) defendant Mickewitz and his cousin were in the truck from which a fatal shot was fired and (2) that the barrel of the shotgun was sticking out of the driver's side window were considered wholly circumstantial in nature, the evidence submitted against appellant is no less subject to the drawing of inferences.

In light of the completely circumstantial nature of the People's case, the court's refusal to charge the jury that it must find that appellant's guilt was proven to a moral certainty to the exclusion of all other reasonable hypothesis of innocence constitutes reversible error, warranting a new trial. The trial court's error cannot be deemed harmless because the evidence was far from overwhelming or convincing and the error in refusing to charge the moral certainty standard was compounded by the court's failure to educate the jury as to even the most basic definition of circumstantial evidence. Accordingly, appellant respectfully requests that his conviction be reversed and a new trial ordered.

## POINT II

## THE TRIAL COURT VIOLATED CPL §270.35 AND DENIED APPELLANT HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO BE PRESENT AT ALL CRITICAL STAGES OF THE TRIAL BY DISCHARGING A SWORN JUROR WITHOUT CONDUCTING THE PROBING INQUIRY REQUIRED BY LAW AND BY MEETING WITH THE JUROR IN THE ABSENCE OF BOTH APPELLANT AND HIS ATTORNEY

### A. Appellant's Challenge To The Trial Court's Errors Is Properly Before This Court For Review on the Merits.

Respondent contends that appellant's claim of a violation of CPL §270.35 is not preserved because counsel failed to object to the trial court's refusal to follow important procedures mandated by the Court of Appeals when discharging a sworn juror. Additionally, respondent maintains that appellant did not have a right to be present during the court's meeting with the juror who was ultimately discharged because the *ex parte* proceeding was not a material part of the trial.

Appellant's claims are properly before this Court for resolution. While trial counsel did state his preference that the sworn juror be discharged, he did not request that discharge take place without the required probing inquiry of the juror and placement of the reasons for discharge on the record by the trial court. Thus, contrary to the implication of respondent's brief, counsel's preference for discharge of the juror did not constitute a waiver of the process designed by the Court of Appeals in Buford to insure protection of every defendant's constitutional right to trial by a legally constituted jury in whose selection the defendant had a

voice. People v. Buford, 69 N.Y.2d 290, 514 N.Y.S.2d 191 (1987).

Moreover, the trial court's refusal to comply with the procedure adopted by the Court of Appeals to guarantee that the application of CPL §270.35's discharge provisions is done in a fashion consistent with a defendant's constitutional rights was an error which "implicates the organization of the court or the mode of proceedings prescribed by law" and presents a question of law which need not be preserved by objection. People v. Ahmed, 66 N.Y.2d 307, 310, 496 N.Y.S.2d 984, 985-86 (1985). CPL §270.35 prescribes that a trial judge must discharge a sworn juror upon finding, "from facts unknown at the time of the selection of the jury," that the juror is grossly unqualified to serve on the jury. The Court of Appeals has specifically recognized that this and the other sections of CPL Article 270 were enacted by the Legislature to provide procedural safeguards for the "constitutional right to a trial by a 'particular jury chosen according to law, in whose selection [the defendant] has had a voice.'" People v. Buford, supra at 297-98, quoting People v. Ivery, 96 A.D.2d 712, 465 N.Y.S.2d 371 (4th Dept. 1983). Thus, the standard for discharging a juror as "grossly unqualified" is "satisfied only 'when it becomes obvious that a particular juror possesses a state of mind which would prevent the rendering of an impartial verdict.'" People v. Buford, supra, quoting People v. West, 92 A.D.2d 620, 622, 459 N.Y.S.2d 909 (1983) [Mahoney, J.P., dissenting].

That counsel below may have stated his preference that the juror in question be removed before hearing directly from that juror did not absolve the trial court of its statutory and common law duty to make the findings necessary to justify discharge. As the Court of Appeals noted in Buford, the focus is on the juror's actual state of mind and whether the juror can render an impartial verdict. Id. That the qualification issue is not to be determined solely by reference to extrinsic information or allegations about the juror is

apparent from the Buford court's specific prescription of exactly what a trial court must do to insure that the constitutional protections afforded by CPL §270.35 are achieved:

> In reaching its conclusion, the trial court *must question* each allegedly unqualified juror individually *in camera in the presence of the attorneys and defendant*. Counsel should be permitted to participate if they desire. In a probing and tactful inquiry, the court should evaluate the nature of what the juror has seen, heard, or has acquired knowledge of, and assess its importance and its bearing on the case. In this context, the court should carefully consider the juror's answers and demeanor to ascertain whether her state of mind will affect her deliberations. The trial court's reasons should be placed on the record. In concluding that a juror is grossly unqualified, the court may not speculate as to possible partiality of the juror based on her equivocal responses. *Instead, it must be convinced that the juror's knowledge will prevent her from rendering an impartial verdict.*

People v. Buford, supra at 299 (emphasis added).

In People v. Ivery, supra, this Court expressly recognized the necessity of convincing justification for the removal of a sworn juror. There, in reversing the conviction and granting a new trial, the Court found the trial judge's limited inquiry into the juror's state of mind to be insufficient, even though both the prosecutor and the court had questioned the juror about his willingness to follow legal instructions and maintain an open mind. Warning that the better practice would have been to conduct a further inquiry *in camera* before removing the juror, this Court took care to emphasize the

importance of conducting a searching inquiry of each potentially unqualified juror:

> The defendant has a constitutional right to a particular jury chosen according to law, in whose selection he has had a voice (N.Y. Const. Art. I, Section 2). As the Court of Appeals aptly stated almost a century ago, "The law prescribes the qualifications of jurors. The Court cannot add to, or detract from them. It cannot itself select the jury, directly or indirectly. It cannot in its discretion, or capriciously, set aside jurors as incompetent, whom the law declares are competent, and thus limit the selection of the jury to jurors whose names may be left. If this is done, a legal right is violated, for which an Appellate court will give redress."

People v. Ivery, supra at 712, quoting Hildreth v. City of Troy, 101 N.Y. 234, 239 (1886).

None of the cases cited by the People in support of their argument that appellant's claims are unpreserved address the issue of whether a trial court's refusal to comply with the inquiry process required by CPL §270.35 and Buford constitutes an error which "implicates the organization of the court or the mode of proceedings prescribed by law" and which, therefore, need not be preserved by specific objection. People v. Ahmed, supra. This distinction is significant because appellant challenges the trial court's complete abdication of its lawful duty to safeguard his constitutional rights by conducting the mandated exploration of the juror's state of mind -- regardless of whether trial counsel has expressed his opinion concerning discharge of the juror on an incomplete record. Notably, appellant's claim does not merely express dissatisfaction with the adequacy of a court's attempt to comply with the mandatory

procedure so painstakingly set forth in Buford. See People v. Torres, infra.

Review by this Court is also proper because appellant was denied his absolute right to be present during the trial court's *ex parte* meeting with the ultimately discharged juror. "In every criminal proceeding, a defendant has an absolute right to be present, with counsel, 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" People v. Ciaccio, 47 N.Y.2d 431, 436, 418 N.Y.S.2d 371, 373 (1979), quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 332 (further citations omitted). The New York State courts have recognized this as a fundamental due process right, as has the United States Supreme Court. See, People v. Turaine, 78 N.Y.2d 871, 573 N.Y.S.2d 64 (1991); Snyder v. Massachusetts, supra.

A claimed violation of the right to be present at all material stages of trial may be raised for the first time on appeal. People v. Mehmedi, 69 N.Y.2d 759, 513 N.Y.S.2d 610 (1987). In fact, the Court of Appeals has specifically ruled that a challenge based on a defendant's exclusion from an inquiry into a juror's state of mind for purposes of determining whether the juror should be discharged need not be preserved by objection at trial. People v. Torres, 80 N.Y.2d 944, 945, 590 N.Y.S.2d 867, 868 (1992) ["Unlike defendant's claim that the right to be present was abridged when the inquiry was conducted in his absence -- an issue we will review even without objection at trial -- a claim that a disqualification hearing was inadequate must be preserved to present a question of law for our review"]. Accordingly, appellant's claims of error are properly before this Court for review and determination.

**B. The Trial Court's Errors Require Reversal Of Appellant's Conviction As A Matter Of Law.**

With respect to the merits, the trial court's refusal to comply with the inquiry and record-making process crafted by the Court of Appeals to insure that the purpose of CPL §270.35 -- safeguarding appellant's constitutional right to trial by a jury of peers in whose selection he has had a voice -- is met and its exclusion of appellant and his attorney from the meeting with the ultimately discharged sworn juror worked in conjunction to create two primary and serious deprivations.

First, the court's refusal to follow the constitutionally-protective inquiry process set forth by the Buford court denied appellant -- and, indeed, everyone else involved -- the opportunity to get beyond the rather "knee jerk" reaction of defense counsel and into a thoughtful investigation of whether Juror Donovan's ability to remain impartial and to fairly judge the case were compromised in any way. In fact, with the prosecutor urging the court to keep Mr. Donovan on the jury and defense counsel recommending that he be discharged, the situation fairly cried out for resolution by way of a Buford inquiry (1062-64). The advantages of such an assessment process are obvious. Through an examination of the juror himself -- rather than presuming from information about the juror provided by third parties -- the court would have been able to come to a reliable conclusion about the juror's fitness to proceed as a sworn juror. This inquiry would also have put to rest what was then an open question for the opposing parties -- and which remains unanswered today. Further, the making of findings of fact would have created a record for review by the appellate courts. The public confidence in the criminal justice system and conservation of judicial resources would also have been well served had the trial court been willing to conduct a quick, but thoughtful, examination of Juror Donovan for legitimate

signs of bias against either party instead of simply assuming that he was grossly disqualified without even talking to him.

Second, had appellant and counsel been present for the meeting between the court and Juror Donovan, appellant would have been in a position to assist in his defense in ways judicially recognized as important and valid. As the Court of Appeals explained in People v. Antommarchi in terms equally applicable to the case at bar:

> As we have noted before, a defendant has a fundamental right to be present during any material stage of the trial . . . A court may conduct side-bar discussions with prospective jurors in a defendant's absence if the questions relate to juror qualifications such as physical impairments, family obligations and work commitments. The court may not, however, explore prospective jurors' backgrounds and their ability to weigh the evidence objectively unless defendant is present. Defendants are entitled to hear questions intended to search out a prospective juror's bias, hostility or predisposition to believe or discredit the testimony of potential witnesses and the venire person's answers so that they have the opportunity to assess the juror's 'facial expressions, demeanor and other subliminal responses.'
>
> By questioning the prospective jurors' ability to weigh evidence objectively and to hear testimony impartially, the court violated defendant's right to be present during a material part of the trial. Moreover, because defendant had a fundamental right to be present, his failure to object to being

> excluded from the side-bar discussions is not fatal to his claim.

People v. Antommarchi, 80 N.Y.2d 247, 250-51, 590 N.Y.S.2d 33, 35 (1992) (citations omitted). See also, People v. Tolliver, 224 A.D.2d 924, 638 N.Y.S.2d 268 (4th Dept. 1996) [defendant's fundamental right to be present was violated when a juror was questioned regarding potential bias or hostility in his absence].

Had appellant been allowed to be present with counsel during the meeting at which the trial court discharged Juror Donovan, appellant would have been able to make his own assessment of Mr. Donovan's demeanor and credibility and would have had the opportunity to ask his attorney make appropriate inquiries or to at least consult with counsel concerning whether disqualification was really appropriate after having heard from Mr. Donovan regarding the circumstances which caused the controversy. The chance to do so was especially important in this case given that appellant had expressed serious concerns about the first alternate juror whom he had seen sleeping during the trial (1063-70, 1075).

While often taken for granted, the importance of having the ability to make such observations -- particularly if you are a criminal defendant -- cannot be overstated. As underscored by the Court of Appeals in People v. Sloan:

> Defendants' presence at the questioning on such matters and the resultant opportunity for them to assess the jurors' facial expressions, demeanor and other subliminal responses as well as the manner and tone of their verbal replies so as to detect any indication of bias or hostility, could have been critical in making proper determinations in the important and sensitive matters relating to

> challenges for cause and peremptories. We cannot conclude that defendants' presence at the side-bar questioning would have been of no benefit or that their absence during such questioning would not have had a substantial effect on their ability to defend. Their exclusion from the questioning was error.

People v. Sloan, 79 N.Y.2d 391, 392-93, 583 N.Y.S.2d 176, 179 (1992) (citations omitted). Such logic is equally compelling in the present circumstances and compels the conclusion that the trial court committed reversible error by meeting with the sworn juror in the absence of appellant and his counsel.

Finally, contrary to respondent's representations, the Court of Appeals' decision in People v. Mullen, 44 N.Y.2d 1, 403 N.Y.S.2d 470 (1978), is not controlling on the issue of whether exclusion of appellant and his attorney from the trial court's conference with Juror Donovan violated appellant's due process and statutory rights. Concededly, more than twenty years ago the Mullen court ruled that an *in camera* meeting held in defendant's absence with a sworn juror during jury selection did not implicate the defendant's right to be present during all material stages of trial. However, developments in the law since the Mullen decision make clear that Mullen is not dispositive of the issue presented by appellant.

The Antommarchi and Sloan decisions have guaranteed a defendant's right to be present during questioning of prospective jurors concerning possible bias, ability to weigh evidence objectively, hear testimony impartially, etc. A criminal defendant's right to be present during other types of proceedings has also been judicially confirmed over the years since the Mullen case was decided. See, People v. Turaine, supra [defendant is entitled to be present at preliminary hearing where testimony is received]; People

v. Mehmedi, supra [defendant has fundamental right to be present during instructions to the jury]; People v. Dokes, 79 N.Y.2d 656, 584 N.Y.S.2d 761 (1992) [Sandoval hearing is material stage of trial at which presence of defendant is required].

During this time, the Court of Appeals has also considered whether a defendant has an absolute right to be present during an *in camera* interview of a sworn juror concerning potential disqualification. In People v. Darby, 75 N.Y.2d 449, 554 N.Y.S.2d 426 (1990), the trial court questioned four sworn jurors in the absence of defendant and his counsel concerning a potentially prejudicial observation made by a fifth juror. On appeal, the defendant challenged only the trial court's exclusion of his attorney from the *in camera* hearing. Noting that in Mullen the Court had determined that the *in camera* questioning of a juror was not a material stage of trial requiring a defendant's presence, based in part on the fact that the presence of defense counsel during the questioning would afford the defendant a fair hearing, the Darby court qualified the Mullen holding:

> By holding here that under Mullen nothing less than counsel's presence will suffice in these circumstances, we need decide no more in this case. While greater safeguards may be desirable or even eventually held to be required depending on some future particular fact pattern, it is unnecessary, because of the narrowness of the defense objection and its determinative impact on this case, to express any additional views to resolve this case.

People v. Darby, supra at 453. Significantly, in so ruling the Court of Appeals noted the Buford decision's requirement that the defendant as well as his attorney should be present at any *in camera* hearing to determine whether a juror is grossly unqualified pursuant to CPL §270.35.

The question of defendant's right to be present at a hearing on a sworn juror's possible disqualification was revisited in People v. Torres, 80 N.Y.2d 944, 590 N.Y.S.2d 867 (1992). There, the Court of Appeals acknowledged again that "greater safeguards may be desirable or even eventually held to be required depending on some future particular fact pattern," but held that, under the facts of that case, defendant's right to be present at all material stages of trial was not violated. Id. at 945. Significantly, at issue in Torres was the court's single question inquiry as to whether the juror knew the defendant, which she denied while noting that her cousin had a friend who might be the defendant's brother. In contrast with Torres, the *ex parte* discussion between the trial judge and Juror Donovan was much more extensive and concerned a more complex question of potential bias.

This Court itself has issued rulings in the past rejecting claims that particular defendants' rights to be present have been violated by trial judges' discussions with sworn jurors outside the presence of the defendants. See, e.g., People v. Williams, 202 A.D.2d 1004, 612 N.Y.S.2d 700 (1994); People v. Stokes, 198 A.D.2d 847, 605 N.Y.S.2d 712 (1993); rev'd on other grounds, 239 A.D.2d 955, 661 N.Y.S.2d 573 (1997). Yet, this Court has also recognized the potential for appellate redress for such a claim. People v. Johnson, 189 A.D.2d 318, 596 N.Y.S.2d 255 (1993) ["The Court of Appeals has stated, however, that better practice would be to conduct the *voir dire* in defendant's presence and that it may impose that requirement or other safeguards in the future" (citations omitted)]. The Fourth Department appears to have taken the same position on these claims as the Court of Appeals did in Torres, finding no error when a defendant's absence from the challenged hearing is mitigated by the presence of his counsel, but reversing when the communication with the juror is conducted *ex parte* (compare People v. Stokes, supra ["It was not error for the court to question a sworn juror concerning her qualification to serve in defendants' absence but in the presence of counsel"] with People

v. Johnson, supra at 320 ["Reversal is mandated, however, because Supreme Court conducted voir dire and discharged a sworn juror, not only in defendant's absence, but, in the absence of defense counsel"].

Appellant submits that this is the appropriate case to recognize a criminal defendant's right to be present at any judicial inquiry into the gross disqualification of a sworn juror for bias, unfairness or prejudice, or for any purpose recognized by the Sloan/Antommarchi line of cases. Where there is so little functional difference between a defendant's judicially recognized ability to contribute to his own defense by being present during voir dire and his similar ability to assist in his own defense at an inquiry into a sworn juror's potential disqualification for bias, unfairness or prejudice, continued differential treatment of the right to be present based upon such insignificant differences amounts to a distinction without real meaning and a capricious denial of constitutional protections at the moment they are most needed. See, People v. Wilson, 199 A.D.2d 631, 605 N.Y.S.2d 131 (3d Dept. 1993) ["And inasmuch as the court's inquiry touched on matters of [sworn] juror bias and prejudice, it was improper to conduct those discussions with neither the defendant nor his attorney being present" (citation omitted)]. At a minimum, this Court should reverse appellant's conviction in light of the trial court's exclusion of even defense counsel from the court's *ex parte* meeting with Juror Donovan; the absence of defense counsel denied appellant "the minimum safeguard necessary to afford him a 'fair and just hearing.'" People v. Johnson, supra at 320 (citations omitted).

Accordingly, appellant respectfully requests that the Court reverse his conviction and grant him a new trial.

## POINT III

## THE TRIAL COURT ERRED IN REFUSING TO RECUSE ITSELF FROM APPELLANT'S CPL §330.30 HEARING

Respondent asserts that appellant has "misplaced" its reliance on the Rules of the Chief Administrator of the Court, Title 22, Section 100 *et seq.* as statutory authority for disqualification. Appellant maintains that even if this Court does not consider regulations promulgated pursuant to the Code of Judicial Conduct to constitute "statutory authority" warranting recusal, appellant can rely on no better measure of a Judge's fitness to preside over his case than these generally recognized and respected standards of judicial comportment. While the preamble to the regulations may disclaim any civil or criminal liability for a Judge's violation of Code provisions, there can be no dispute that the Code sets forth standards of conduct with which Judges in New York State are expected to comply. Matter of Steinberg v. State Commission on Judicial Conduct, 51 N.Y.2d 74, 83, 431 N.Y.S.2d 704 (1980). These standards carry no greater weight than when they are the measure of judicial fairness and integrity.

As this Court has warned, the judiciary is not only required to be fair and impartial in fact, but must also conduct its business in such a way as to avoid even the appearance of prejudice:

> "The right of every person accused of crime to have a fair and impartial trial, before an unbiased court and an unprejudiced jury, is a fundamental principle of criminal jurisprudence." Not only must there be no prejudice, actual or implied, but even the appearance of prejudice must be avoided. "Next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as

> will beget no suspicion of the fairness and integrity of the judge."

People v. Greenfield Construction Company, Inc., 48 A.D.2d 765, 368 N.Y.S.2d 89 (1975) (citations omitted). In furtherance of these ideals, Section 100.3(6) of the Code of Judicial Conduct prohibits a judge from engaging in *ex parte* communications concerning a pending or impending proceeding.

In entertaining Juror Luce's concerns about the trial during a forty-five minute *ex parte* conversation in chambers, the trial court violated the Code of Judicial Conduct and, importantly, did so at a critical stage of the proceedings at which appellant had an absolute right to be present. It must not be overlooked that this conversation was not merely something which happened in passing years after the trial. To the contrary, Juror Luce approached the trial judge to talk about the trial and the introduction of extra-record information into the jury's deliberations prior to sentencing, during appellant's window of opportunity to file a CPL §330.30 motion to set aside the verdict due to improper conduct by a juror. CPL §330.30(2).

While appellant has not discovered any cases specifically on this point and, therefore, believes this to be a case of first impression, appellant and his attorney should have been included in this meeting (as the Code of Judicial Conduct requires). It is axiomatic that a criminal defendant has an absolute right to be present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330 (1934). Had appellant and his counsel been made part of this meeting, not only would they have obtained first-hand knowledge of the substance of Juror Luce's concerns instead of being forced to imperfectly reconstruct the communications between Ms. Luce and the court at a later date, but appellant would have been in a position to assist his attorney in exploring the issues raised by Ms. Luce by

reference to his own recollection of the voluminous, and often conflicting, testimony presented at trial. There is no reason to believe that appellant would not have been able to use those evaluative skills recognized by the Court of Appeals in People v. Antommarchi, supra and People v. Sloan, supra, as important to defendant's participation in the determination of a potential juror's bias or hostility to a similar extent in assessing Ms. Luce's explication of events during the course of trial, including the introduction of extra-record information into the jury's deliberations. Further, even if appellant had no right to be present at this meeting, it should not have been held in the absence of defense counsel. See, e.g., People v. Darby, 75 N.Y.2d 449, 554 N.Y.S.2d 426 (1990); People v. Johnson, 189 A.D.2d 318, 596 N.Y.S.2d 255 (4th Dept. 1993).

Moreover, recusal is required, not only because the trial judge was a material witness to what Juror Luce actually said, but also because the *ex parte* nature of the meeting between the court and the juror prevented appellant and his counsel from knowing what was said at the meeting and how it was said, consequently making them unable during the course of Ms. Luce's hearing testimony to determine whether certain events crucial to her credibility occurred (e.g., adding information to her testimony which was not previously disclosed to the trial court; omitting information previously disclosed at the *in camera* conference; deviating from her previous description of events; testifying with a significantly different demeanor than she possessed during her meeting with the court; misapprehension by the court as to what Ms. Luce actually said during their private conversation). As appellate counsel pointed out during oral argument of the CPL §330.30 motion, this is entirely different than most cases where a trial judge is presumed to be able to divorce himself from knowledge gained outside of the trial process. See, People v. Brown, 24 N.Y.2d 168, 299 N.Y.S.2d 190 (1969) [Judge who presided over Huntley hearing may preside over non-jury trial]. For

example, in the common case where a Judge is presumed to be able to objectively determine guilt in a non-jury trial despite awareness of excluded prior crimes of the defendant (see, People v. Latella, 112 A.D.2d 324, 491 N.Y.S.2d 774, lv. denied 65 N.Y.2d 983, 494 N.Y.S.2d 1052 (1985)), a crucial distinction is that a defendant and his attorney are present during the Sandoval hearing and know exactly what the court was exposed to in terms of prior convictions, as appellate counsel specifically explained to the court below:

> Clearly the difference is we're all there. We're hearing what you hear. We know what you hear. So that still in the future if you are going a particular way, we can say, but Your Honor, remember what else was said at that particular encounter. We're all there . . . In the reality of this case, we're not all there (1774).

By the trial judge's refusal to recuse himself, the court became an unsworn witness in the proceedings below whose recollection potentially or in fact had a substantial impact on the weight which was accorded to Juror Luce's testimony, wholly unbeknownst to appellant. This, and the serious questions raised as to the trial court's impartiality in light of the statements made by the court to Rae Collieti, provided good faith justification for recusal of the trial judge during the CPL §330.30 proceedings concerning juror misconduct. Accordingly, appellant respectfully requests that his conviction be reversed.

## POINT IV

## JUROR MISCONDUCT DURING DELIBERATIONS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL

Appellant will rely on his main brief for the arguments in support of his contention that the trial court erred in denying his CPL §330.30(2) motion to set aside the verdict on the ground of juror misconduct. Appellant's claims of error are well documented by the hearing testimony and clearly establish that the jury -- and particularly the holdout jurors, Denise Luce and Ruth Painter -- were improperly influenced by the introduction of extra record facts during deliberations.

Appellant would note, however, that the waiver claim advanced by the People is meritless. Respondent contends that appellant waived his right to object to the introduction of extra record information concerning the crime scene by not challenging the jurors during *voir dire*. In support of this argument, respondent cites this Court's decision in People v. Lanaux, 197 A.D.2d 908, 602 N.Y.S.2d 265, lv. denied 83 N.Y.2d 873, 613 N.Y.S.2d 134 (1994).

In Lanaux, the defendant brought a motion pursuant to CPL §330.30(2) to set aside the verdict on the ground that he and a juror had a longstanding relationship. Rejecting the claim of improper conduct by a juror, this Court found that the defendant had failed to set forth a believable explanation for why he had not challenged the juror's qualifications during *voir dire*. In contrast, the circumstances in the case at bar do not bear even a remote resemblance to the Lanaux situation. Here, appellant is not objecting to a close relationship with a juror he was aware of and kept hidden during *voir dire*. Rather, appellant contends that the

impermissible interjection of extra record information concerning the crime scene tainted his conviction.

Respondent would have this Court stretch the Lanaux holding to ridiculous lengths. The suggestion that appellant waived his right to object to jurors improperly introducing their own knowledge of the crime scene and the reputations of certain witnesses into the deliberations to refute arguments made by holdout jurors simply because appellant did not challenge every juror who was familiar with the area of the crime scene completely misinterprets the Lanaux decision, which was based on highly unusual facts suggestive of collusion or sandbagging on the part of that defendant. Moreover, there is no bar to a juror who is familiar with a public crime scene sitting on a jury. Rather, the taint arises when that juror becomes an unsworn witness during jury deliberations by introducing facts not brought out during the presentation of evidence by the parties. See, People v. Edgerton, 115 A.D.2d 257, 495 N.Y.S.2d 858, 859 (4th Dept. 1985). Such misconduct occurred during jury deliberations in appellant's case and, consequently, his conviction should be reversed and a new trial granted.

## POINT V

## THE SENTENCE IMPOSED ON APPELLANT IS HARSH AND EXCESSIVE AND SHOULD BE MODIFIED IN THE INTEREST OF JUSTICE

Appellant will rely upon the argument set forth in his principal brief with respect to Point V.

## POINT VI

## APPELLANT'S CONVICTION IS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AND IS AGAINST THE WEIGHT OF THE EVIDENCE

Appellant will rely upon the argument set forth in his principal brief with respect to Point VI.

## CONCLUSION

For all the reasons proffered in this reply brief and appellant's principal brief, appellant requests that this Court reverse his convictions and dismiss the indictment or, in the alternative, grant a new trial.

DATED: September 10, 1999

Respectfully submitted,

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February 28, 2000

Honorable Judith S. Kaye
New York State Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

ATTENTION: Clerk of the Court

Re: People v. John L. Reynolds
Cattaraugus County Indictment No. 95-168

***Appellant's Request for a Stay of Execution of Sentence and Leave to Appeal***

Dear Judge Kaye:

Please accept this letter as appellant John Reynolds's application for a certificate granting leave to appeal to the Court of Appeals pursuant to CPL § 460.20, and for a stay of judgment pending appeal to the Court of Appeals from the Appellate Division, Fourth Judicial Department, pursuant to CPL § 460.60. Enclosed for the Court's review are copies of appellant's main Brief, the Brief by the respondent, appellant's Reply Brief, and the Order and Decision of the Fourth Department entered February 16, 2000.

No prior application for the relief sought has been made to any justice of the Appellate Division. Counsel seeks oral argument of the leave application since he believes that this case

has great merit and wishes to be able to persuade the Court through both written and oral presentation.

This request for leave to appeal presents significant questions of law, the resolution of which will have a state-wide impact on the administration of criminal justice. Most notably, the Decision and Order of the Appellate Division, Fourth Judicial Department necessitates review by this Court to correct a misinterpretation of the rules defining circumstantial evidence and governing the application of the "moral certainty" charge in a wholly circumstantial case where circumstantial evidence was not even defined for the jury. Appellant also contends that the trial court violated his state and federal constitutional rights to be present at all critical stages of trial when it met with a juror in the absence of both appellant and his attorney and then discharged that juror without conducting the probing inquiry required by law, all in violation of CPL § 270.35. Additionally, appellant maintains that the evidence presented at trial was legally insufficient to sustain the verdict, that the trial court erred in refusing to recuse itself from appellant's CPL § 330.30 hearing and, finally, that the introduction of extra record information into the jury's deliberations irredeemably tainted the verdict. Each of these issues has ramifications which extend well beyond the circumstances of this case, warranting scrutiny by this Court.

## PROCEDURAL HISTORY

On November 30, 1995, appellant and seven co-defendants were charged by a Cattaraugus County grand jury with murder in the second degree [Penal Law § 125.25(a)], manslaughter in the first degree [Penal Law § 125.20(1)], manslaughter in the second degree [Penal Law § 125.15(1)], assault in the first degree [Penal

Law § 120.10(1)], and assault in the second degree [Penal Law § 120.25(2)].[1] Each of the co-defendants pled guilty prior to trial, but appellant chose to exercise his trial rights. The trial was conducted before the Honorable Larry M. Himelein. The trial commenced on September 8, 1997 and concluded with the jury's verdict on September 17, 1997. The jury acquitted appellant of murder in the second degree, assault in the second degree and assault in the third degree, but found him guilty of manslaughter in the second degree.

On January 29, 1999, appellant was sentenced to an indeterminate period of incarceration of from four to twelve years. Notably, the maximum sentence imposed on the most culpable co-defendant – who by his own admission beat the decedent – was two and one-third to seven years.

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[1] Appellant was one of the petitioners in Matter of Haggerty v. Himelein, an appeal by the New York State Attorney General and the District Attorney of Cattaraugus County from the Order of the Appellate Division, Fourth Judicial Department, which granted a writ of prohibition preventing trial on the indictment on the ground that the Attorney General was without jurisdictional authority to prosecute this local criminal matter. The Court of Appeals found that the Attorney General and his staff were simply assisting the District Attorney and reversed the Order of the Appellate Division in a decision reported at 89 N.Y.2d 431 (1997).

## I. THE MORAL CERTAINTY INSTRUCTION REQUESTED BY THE DEFENSE AT TRIAL SHOULD HAVE BEEN CHARGED IN LIGHT OF THE WHOLLY CIRCUMSTANTIAL NATURE OF THE PEOPLE'S PROOF AGAINST APPELLANT.

In order to convict appellant of reckless manslaughter in violation of Penal Law § 125.15(1), the prosecution was required to prove that appellant was aware of and consciously disregarded a substantial and unjustifiable risk of death to Kevin King (see, Penal Law § 15.05[3]). Since appellant was charged as both a principal and as an accomplice, the provisions of Penal Law § 20.00 also applied ("When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes or intentionally aids such person to engage in such conduct"). The prosecution's proof as to this charge was entirely circumstantial, requiring the giving of a moral certainty instruction which was refused by the trial court.

## RELEVANT FACTUAL BACKGROUND

The events relevant to this case occurred on October 22, 1994 at the East Side Pizzeria in Olean, New York. At approximately 2:30 a.m., appellant John Reynolds entered the pizzeria along with a number of other young men and women. They took seats at two tables near the front window of the restaurant. A few minutes later, decedent Kevin King and two friend – Steven Hellwig and Kevin Kenyon – walked in. Words

were exchanged between the two groups and, ultimately, Hellwig and Kenyon challenged the group John Reynolds was with to a fight outside the restaurant. The People maintained that in response to this challenge appellant said, "Are we going to take this shit?", but the identity of the individual who uttered this statement was vigorously disputed at trial.

Reynolds and his friends followed King, Hellwig and Kenyon into the parking lot of the pizzeria. While two of the thirteen witnesses to the events at the pizzeria that evening testified that John Reynolds exited the restaurant ahead of his friends, one of those witnesses – waitress Gail Wheeler – acknowledged that on the way out Reynolds told her that he was going outside to speak to Steven Hellwig, who was the brother-in-law of Reynolds's sister.

The descriptions of the physical confrontations in the parking lot of the East Side Pizzeria varied from witness to witness, but one important fact remained constant: in this wholly circumstantial case, not a single witness saw John Reynolds strike, punch or kick anyone, much less the decedent, Kevin King. Appellant's only mistake was being present in an area where fights were occurring.

Not so with appellant's co-defendants. Each of them was specifically identified as an attacker of Kevin King. In fact, Shawn Appleby quite frankly admitted that he punched out Kevin Kenyon and King. As he left the East Side Pizzeria, Appleby saw Kenyon standing on the sidewalk facing him, with Hellwig and King behind him. When Kenyon put his hands in the air and said, "Are you ready to go?", Appleby punched him so hard that Kenyon fell to the ground. Appleby then moved past Kenyon to

get at Hellwig and King. When those two separated, he went after King and landed a powerful blow to the area of King's mouth, causing King to "crumple" to the ground near the driver's side front quarter panel of a red pickup truck. Appleby saw his brother, Shane, also take a swing at King, but did not know if he, too, connected.

As he stood over Kevin King, Appleby saw Kenyon lying partially on the sidewalk and Hellwig in a fight immediately in front of the red pickup truck. In the approximately seven foot distance between Appleby and the front of the truck, several people were fighting. When Hellwig came toward him, Appleby knocked him to the ground with a single punch.

Steven Hellwig explained that he had approached John Reynolds outside the pizzeria to ask what was going on and, as Reynolds started to answer, another guy came over Reynolds's shoulder and started hitting him. Hellwig was then surrounded by people who were punching him from every angle. He was pushed up against a pickup truck during the fight and several people continued to beat him. When the fight was over, Hellwig walked to the front of the truck and saw Kevin King laying on his stomach in the parking lot.

As Hellwig looked for his glasses around the front of the truck, a male in a tan sweater ran over and punched him in the head and others pushed him up against a car which was parked next to the pickup truck and beat him again. When this second confrontation ended, Hellwig was kneeling over King.

During questioning at the scene, Hellwig told police that he did not see John Reynolds do anything and, the next day, he

also told his brother that he did not see Reynolds involved in the fight. Hellwig testified at trial that he did not see Reynolds fight with anyone and did not observe him to direct, encourage or command anyone to fight or aid anyone involved in the fight.

Shane Appleby also did not see John Reynolds in any physical altercation that evening. He recalled following Shawn out the door and seeing Shawn punch Kevin Kenyon to the ground before running over to Kevin King and hitting him. Shane also landed a blow on King and watched him fall to the ground in the parking lot. During the incident, Shane saw Reynolds walking around another fight occurring on between two vehicles near the corner of the restaurant, but did not see him take part in the melee.

Several other witnesses to the altercation outside the pizzeria testified variously to the seven co-defendants kicking and punching Kevin King, but absolutely no one saw John Reynolds strike, punch or kick anyone else or encourage anyone to do so. Indeed, eyewitness Pamela Brochu told State Police investigators the day after the incident that she saw four males and one female striking King and ultimately identified them as Keri Haggerty, Brian Mooney, Shawn Appleby, Shane Appleby and Matthew Sweatland. According to Brochu, the Appleby brothers were definitely kicking King. Brochu did not, however, see John Reynolds involved in the fighting outside the restaurant. She saw him only after the fight was over as he was getting into his pickup truck, and heard appellant say, "I had nothing to do with this."

Waitress Gail Wheeler observed the fight and did not see appellant strike, punch or kick anyone. The only time she saw him outside the pizzeria was as he was running away from the area

of the fight after it broke up. Wheeler did not, however, see Reynolds anywhere during the fight.

Not a single one of the many eyewitnesses to this incident testified that John Reynolds fought anyone or encouraged anyone else to fight. This is consistent with the statement Reynolds gave the morning after the incident to the Cattaraugus County Sheriff's Department. Voluntarily appearing at the station house at 7:45 a.m., appellant was interviewed by Lieutenant Detective Dennis John. In response to the detective's questions, John described events inside the restaurant after Steven Hellwig arrived with Kevin Kenyon and another guy appellant did not know. He explained that when he and his friends left the restaurant, "all hell broke loose." There were people fighting all over, but he did not get involved and could not say who was hitting whom. The fighting lasted about five minutes and he got into his pickup truck to leave after it was over. When the police arrived at the scene, appellant parked his truck and told Officer Sean Obergfell what had happened.

## APPELLANT'S REQUEST FOR A MORAL CERTAINITY INSTRUCTION

In light of the entirely circumstantial nature of the proof against John Reynolds, defense counsel requested that the trial court instruct the jury that appellant's guilt must be established to a moral certainty in accordance with the rule governing evaluation of circumstantial evidence. The court, however, refused to render the requested instruction on the ground that direct evidence had been presented, obviating the need for such a charge. Ultimately,

the jury was not given even the minimal instruction on what circumstantial evidence is and how it is to be evaluated.[2]

In a CPL § 330.30 motion, appellant moved to set aside the verdict on the ground that a moral certainty charge should have been given. The trial court denied the motion, ruling first that defense counsel may not have preserved the claim and, second, that direct evidence of appellant's guilt was introduced at trial. The court reasoned that appellant's alleged statement inside the restaurant – "Are we going to take this shit?" – constituted direct proof of John Reynolds reckless state of mind. The trial court also stated that "[t]here was further direct evidence that defendant then led a charge of ten people out the door to confront three people in the parking lot. Given the hostilities that had occurred inside, a reasonable jury could consider that conduct reckless."

Appellant raised the trial court's refusal to give a moral certainty charge again on appeal to the Appellate Division, Fourth Judicial Department maintaining that the proof against him was entirely circumstantial, including the alleged statement, "Are we going to take this shit?" The People countered that the statement was direct evidence of his guilt. The Appellate Division ruled:

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[2] The Appellate Division found appellant's claim that the trial court erred in failing to give even a basic explanation of the nature of circumstantial evidence was not preserved even though trial counsel did request the moral certainty instruction which, of necessity, incorporates circumstantial evidence (see, e.g., CJI §9.05 ). Appellant submits that the need for an instruction on how to evaluate circumstantial evidence was inherent in trial counsel's request for the moral certainty instruction and that the court's failure to give any guidance to the jury on this crucial issue should have been reviewed by the Appellate Division as a meritorious basis for reversal of appellant's conviction.

> There is no merit to defendant's contention that the court erred in refusing to charge the "moral certainty" test for evaluating circumstantial evidence. Evidence of defendant's guilt was not purely circumstantial (*see*, People v. Daddona, 81 N.Y.2d 990, 992; People v. Barnes, 50 N.Y.2d 375, 379-80). With respect to defendant's complicity, there was direct evidence (*see*, People v. Daddona, supra, at 992) establishing that defendant urged his accomplices to assault the three men (*see*, People v. Roldan, 88 N.Y.2d 826, 827; People v. Blount, ___ A.D.2d ___[decided Oct. 21, 1999]). A moral certainty instruction is not required merely because the proof with respect to any particular element—here, intent—is wholly circumstantial (*see*, People v. Johnson, 65 N.Y.2d 556, 561, *rearg denied* 81 N.Y.2d 784; People v. Santiago, 255 A.D.2d 63, 67-69, *lv. denied* ___ N.Y.2d ___ [decided Nov. 30, 1999]).

The ruling of the Appellate Division, Fourth Department is in error and should be reversed. The proof urged by the People and adopted by the Appellate Division as direct evidence of John Reynolds' guilt is actually a textbook example of circumstantial evidence. Even if it is assumed that appellant made the statement attributed to him - "Are we going to take this shit?" - that comment was not direct proof showing Reynolds was aware of and consciously disregarded a substantial risk of death to Kevin King. As appellate's counsel pointed out during argument of the CPL § 33.30 motion:

> You can take that any way you want but [there are] three ways to manifest not taking this shit, Your Honor, and one way is to get out of there so you don't have to take this shit anymore. Number two is to say something back so that I'm not taking this shit, I'm giving it back to you. Third way is to kick the shit out of someone. There [are] three ways to do it and I submit that it requires an inference to figure out which way. And that's why the circumstantial evidence rule was necessary and something should have been given to them.

The inherently circumstantial nature of this supposed proof of appellant's encouragement of his accomplices to assault Kevin King and his friends is manifest. Even assuming that John Reynolds made this comment – certainly a subject of conflicting testimony and in no way conceded by appellant – the mere utterance of such words does not directly establish any principal fact. The meaning of the statement depends on the inference one draws from it. In the absence of an inferential process, the statement exists only as a collateral fact without direct evidential value. Cf., People v. Guidice, 83 N.Y.2d 630 (1994) [where this Court, in an assault prosecution, concluded that the trial evidence was not wholly circumstantial given that "Anthony Guidice's statements, among others, that he 'sent two guys to break [Meyer's] legs,' and that he 'put him in the hospital,' amount to acknowledgements that he solicited, requested, or commanded the attack with intent to cause physical injury under Penal Law § 20.00"].

Significantly, in the case at bar, the People bore the burden of establishing beyond a reasonable doubt that John Reynolds was aware of and consciously disregarded a substantial risk of death to Kevin King or shared that particular mental state with others and solicited, requested, commanded, importuned or intentionally aided the conduct which created the substantial risk of death. The worst inference that can be drawn from the statement "Are we going to take this shit?" is that appellant was encouraging some type of response to the challenge issued by Hellwig and Kenyon. Whether such reaction was to be verbal or physical in nature cannot be inferred from the mere words attributed to appellant. The inescapable conclusion, however, must be that this statement cannot be considered under any circumstances to be direct evidence that John Reynolds was aware of and consciously disregarded a substantial risk of death to Kevin King.

Indeed, even if the statement is properly attributable to appellant, the circumstances in which the remark was made compel the conclusion that it cannot be considered direct evidence of appellant's awareness and conscious disregard of a known substantial risk of death to Kevin King. For example, the statement was not made in reference to anything the decedent said. Rather, it was purportedly said in response to the challenges of Steven Hellwig and Kevin Kenyon. Moreover, the altercations outside the restaurant involved several people at different locations. A simple non-directing remark made inside a restaurant in response to comments made by individuals other than the decedent and uttered before the separate confrontations with Hellwig, Kenyon and King ever began cannot be considered direct evidence that appellant knew of a substantial risk of death to Kevin King and consciously disregarded it or solicited other to engage in

conduct knowing a substantial risk of lethality could be created by such behavior.

Moreover, the People's proof did not exclude to a moral certainty the inference that the person or persons who struck and kicked King while he was laying on the ground spontaneously and independently formed their decision to engage in such behavior. Indeed, even if one assumes an interpretation of the statement most favorable to the prosecution, the strongest inference which can be drawn is that some form of response to Hellwig's and Kenyon's challenges was being encouraged. While the People prefer the interpretation that appellant was encouraging physical violence, the fact remains that such an inference was just one of several available to the trier-of-fact and one which conflicts with eyewitness testimony that appellant told Gail Wheeler that he was exiting the restaurant to talk with Steven Hellwig and Hellwig's own testimony that he and appellant were just starting to talk when someone reached around appellant and struck Hellwig.

The Appellate Division's misplaced reliance on several of this Court's decisions provides an additional and compelling reason to grant leave to appeal in this case. For example, the Fourth Department cited People v. Daddona, 81 N.Y.2d 990 (1993), in support of its conclusion that appellant's conviction was supported in part by direct evidence that he urged his associates to assault King and his friends. Daddona, however, is easily distinguishable. There, this Court found that direct observations of the defendant waving stolen cars into a driveway, loading car parts into the back of a station wagon, and then waving the stolen cars now missing parts back out of the driveway was direct evidence of his constructive possession of the stolen vehicles. The central issue with respect to the criminal possession charges at issue in Daddona

was whether the defendant had dominion and control over the stolen vehicles in question. The above proof in and of itself obviously demonstrated that defendant Daddona was exercising control over the vehicles without the necessity of inference drawing; Daddona was seen in the act of controlling the movement of the stolen cars and car parts.

People v. Barnes, 50 N.Y.2d 375 (1980), also does not support the Appellate Division's conclusion that the case against appellant was not entirely circumstantial. In Barnes, the defendant was convicted of attempted burglary in the third degree and attempted petit larceny. He was discovered "crouched behind a table or desk in the middle of the night in a store which obviously was the target of widespread looting. The security gate was torn from the front of the establishment, and the windows were smashed leaving pieces of shattered glass about the entry to the premises." Id. at 381. This Court also noted that the store could not be accessed by merely wandering off the street; "rather, it appears that entry could only be gained by straddling a two-foot ledge strewn with jagged glass." Id.

The Barnes court concluded that the eyewitness testimony of the arresting police officers regarding their discovery of the defendant inside the ransacked store constituted direct proof of the defendant's intent to commit a crime while unlawfully in the building. Significantly, the parties in that case stipulated that if the trier-of-fact believed that defendant was inside the store, it should be found that he did not have permission or authority to be there. People v. Barnes, supra at 379, n. 2. Consequently, the determining factor - whether or not the defendant was actually found inside the store - was proven by the officers' direct observations of the defendant.

The Fourth Department's reliance on People v. Roldan, 88 N.Y.2d 826 (1996), is also misplaced. Roldan involved the accessorial liability of a defendant who "stood by 'looking out' over the surrounding area while the accomplice robbed two victims at knifepoint." Id. at 826-27. This proof as to the defendant's overt acts as a lookout was established through eyewitness testimony. The First Department upheld the conviction and ruled that a circumstantial evidence charge was not required because the defendant's observed conduct was actual direct proof establishing his guilt. People v. Roldan, 211 A.D.2d 366, 370 (1995). This Court affirmed the decision of the Appellate Division, emphasizing that the eyewitnesses' observations of the defendant's acts in his capacity as a lookout were direct proof of the gravamen of the crime: that he intentionally aided his associate in robbing the victim at knifepoint. People v. Roldan, 88 N.Y.2d at 827.

In the instant case, however, not a single piece of evidence stands as direct proof of appellant's guilt. He was not observed striking or kicking Kevin King in a manner which created a grave risk of death. He was not seen helping or directing another individual to commit such an act. John Reynolds made no statements demonstrating an intent to strike or kick the decedent in a manner which created a substantial risk of death, nor did he encourage anyone else to do so. In sum, the evidence was entirely circumstantial and the requested moral certainty charge should have been given.

The need for an instruction concerning the proper evaluation of circumstantial proof and the permissible manner in which inferences may be drawn – including the requirement that the People's proof exclude to a moral certainty all reasonable hypotheses of innocence – is patent and the failure to so charge the

jury constitutes reversible error. Indeed, in People v. Sanchez, 61 N.Y.2d 1022 (1984), this Court reversed a murder conviction because the trial court refused defendant's request for a "total circumstantial charge" based upon the defendant's statement that he was present at the victim's apartment on the night of the murder and hit her twice after she made offensive remarks to him. The Court explained that the defendant's statements were circumstantial, rather than direct, evidence of guilt since the decedent was strangled by a telephone wire:

> Respondent's statements constituted circumstantial, not direct evidence of guilt. Since the case was submitted to the jury on the theory that the cause of death was strangulation by a telephone wire, the key issue for the jury's determination was the identity of the strangler. Respondent's statements may have proved his presence at the scene of the crime close in time to its commission, but the fact of his presence did not establish that he was the strangler. While it may at times be appropriate to leave to the jury the question whether an admission is direct or circumstantial evidence, such deference is inappropriate where, as here, the admission cannot be interpreted to establish the act charged. Thus, the evidence against respondent was entirely circumstantial and the trial court erred in refusing to so instruct the jury.

People v. Sanchez, supra at1023 (citation omitted).

Appellant respectfully submits that the Appellate Division, Fourth Judicial Department likewise erred in concluding that a

moral certainty instruction need not have been given and urges the Court to take this opportunity to rectify the Appellate Division's misinterpretation of prior Court of Appeals' decisions concerning the nature of direct and circumstantial evidence. If left intact, the Appellate Division's ruling in this regard will substantially diminish the assurances traditionally accorded to criminal defendants that convictions based on entirely inferential proof must result from properly drawn inferences which exclude to a moral certainty all reasonable hypotheses of guilt.

## II. THE APPELLATE DIVISION ERRED IN AFFIRMING APPELLANT'S CONVICTION DESPITE THE TRIAL COURT'S CLEARLY IMPROPER DISCHARGE OF A SWORN JUROR IN VIOLATION OF CPL SECTION 270.35.

During the course of appellant's trial, a sworn juror, Timothy Donovan, approached Cattaraugus District Attorney's Office Investigator Stouffer and handed him an envelope containing a note asking Stouffer to intervene on the juror's behalf on a speeding ticket by taking the enclosed letter to Assistant Cattaraugus District Attorney Leo Murphy and pleading the juror's case. Investigator Stouffer alerted the trial court to this occurrence and the court called the attorneys from both sides and appellant into chambers to discuss the matter.

The prosecutor felt that the juror could be left on the jury, while defense counsel requested that juror be removed because an appearance of impropriety had been created and also because counsel was concerned that the juror had not disclosed his relationship with Investigator Stouffer during jury selection.

Without first consulting with the juror, the trial court concluded that Mr. Donovan should be discharged and the first alternate seated in his place. In discharging the juror, however, the court ignored the requisites of CPL § 270.35. Instead of conducting the probing inquiry expected under the statute, the trial judge told the attorneys and appellant to leave his chambers and proceeded to have a brief conversation with juror Donovan in camera. No inquiry concerning the jurors partiality was made and no findings were put on the record.

In People v. Buford, 69 N.Y.2d 290 (1987), this court set forth the procedure which trial judges are required to follow in discharging a sworn juror pursuant to CPL § 270.35:

> "In reaching its conclusion, the trial court must question each allegedly unqualified juror individually in camera the presence of the attorneys and defendant. Counsel should be permitted to participate if they desire. In a probing and tactful inquiry, the court should evaluate the nature of what the juror has seen, heard, or has acquired knowledge of, and assess its importance and its bearing on the case. In this context, the court should carefully consider the juror's answers and demeanor to ascertain whether her state of mind will affect her deliberations. The trial court's reasons should be placed on the record. In concluding that a juror is grossly unqualified, the court may not speculate as to possible partiality of the juror based on her equivocal responses. Instead, it must be convinced

> that the juror's knowledge will prevent her from rendering an impartial verdict."

People v. Buford, supra at 299.

On appeal, appellant argued that the trial court had violated CPL § 270.35 and appellant's state and federal rights to be present during all material stages of trial. The Appellate Division, Fourth Judicial Department, rejected appellant's challenge, noting that defense counsel had requested that the juror be discharged and did not ask that the juror be questioned directly. The Appellate Division also ruled that "[a] conference leading to the court's discharge of a sworn juror is not a critical stage of trial at which a defendant must be present. In any event, defendant was present during the entire conference leading to that determination, although not present when the court informed the juror of his discharge."

Appellant submits that the decision of the Appellate Division improperly diminishes the necessity and importance of the probing inquiry described in the Buford opinion. Further, the Appellate Division failed to accord proper deference to appellant's fundamental due process right to be present at all material stages of trial.

Contrary to the Appellate Division's reasoning, that counsel below may have stated his preference that the juror in question be removed before hearing directly from that juror did not absolve the trial court of its statutory and common law duty to make the findings necessary to justify discharge. As this Court noted in People v. Buford, supra, the standard for discharging a juror as "grossly unqualified" is "satisfied only 'when it becomes

obvious that a particular juror possesses a state of mind which would prevent the rendering of an impartial verdict.'" People v. Buford, supra at 297-298, quoting People v. West, 92 A.D.2d 620, 622 (1983) [Mahoney, J.P., dissenting]. Necessarily, the focus of the Buford inquiry is on the juror's actual state of mind and whether the juror can render an impartial verdict. Consequently, in order to ensure that the constitutional protections afforded by CPL § 270.35 are achieved, this Court requires that a trial court conduct a "probing and tactful inquiry" for the purpose of evaluating "the nature of what the juror has seen, heard, or has acquired knowledge of, and [to] assess its importance and bearing on the case." People v. Buford, supra at 299.

In the case at bar, the decision as to juror Donovan's fitness to continue as a sworn juror was made on the basis of a discussion between the court, the parties and Investigator Stouffer, and represents the results of third party speculation as to juror Donovan's state of mind and partiality. Appellant submits that the fact that counsel was willing to consent to removal of a sworn juror without first hearing from the juror himself does not relieve the trial court of the responsibility of conducting the required inquiry to ascertain directly from the juror the circumstances of the particular situation and their affect on the jurors' ability to deliberate impartially. As this Court warned in Buford, "[i]n concluding that a juror is grossly unqualified, the Court may not speculate as to possible partiality of the juror based on her equivocal responses." People v. Buford, supra at 299. In the instant case, the Court's determination as to the gross unfitness of juror Donovan to continue as a sworn juror was made without any inquiry even remotely designed to elicit responses from juror Donovan by which the court could ascertain whether his state of mind was such that he could not deliberate on the case impartially.

Indeed, far from speculating as to the juror's state of mind based on equivocal responses, the trial court in this case discharged the sworn juror without having obtained even that minimal - and unacceptable - proof of justification for discharge.

Appellant requests that the Court of Appeals grant leave to appeal for the purpose of establishing a bright line rule that sworn jurors may not be discharged without the probing and tactful inquiry required by Buford, even where defense counsel in his opinion thinks such an inquiry would be unimportant.

Furthermore, appellant submits that this case presents an opportunity for the Court of Appeals to elucidate the "greater safeguards" which it stated in People v. Torres, 80 N.Y.2d 944 (1992), might be necessary to protect a defendant's right to be present at all material stages of trial. As appellant argued before the Appellant Division, this Court has guaranteed a defendant's right to be present during questioning of prospective jurors concerning possible bias, ability to weigh evidence objectively, hear testimony impartially, etc. See People v. Antommarchi, 80 N.Y.2d 247 (1992); People v. Sloan, 79 N.Y.2d 391 (1992). The court has also confirmed a criminal defendant's right to be present during other types of proceedings. See People v. Turaine, 78 N.Y.2d 871 (1991) [defendant is entitled to be present at preliminary hearing where testimony is received]; People v. Mehmedi, 69 N.Y.2d 759 (1987) [defendant has fundamental right to be present during instructions to the jury]; People v. Dokes, 79 N.Y.2d 656 (1992) [Sandoval hearing is material stage of trial at which presence of defendant is required].

In People v. Darby, 75 N.Y.2d 449 (1990), this Court addressed an issue very similar to that presently advanced by

appellant. There, the trial court questioned four sworn jurors in the absence of the defendant and his counsel concerning a potentially prejudicial observation made by a fifth juror. On appeal, the defendant challenged only the trial court's exclusion of his attorney from the *in camera* hearing. Noting that in People v. Mullen, 44 N.Y.2d 1 (1978), this Court had determined that the *in camera* questioning of a juror was not a material stage of trial requiring a defendant's presence, based in part on the fact that the presence of defense counsel during the questioning would afford the defendant a fair hearing, the Darby court qualified the Mullen holding:

> "By holding here that under Mullen nothing less than counsel's presence will suffice in these circumstances, we need decide no more in this case. While greater safeguards may be desirable or even eventually held to be required depending on some future particular fact pattern, it is unnecessary, because of the narrowness of the defense objection and its determinative impact on this case, to express any additional views to resolve this case.

People v. Darby, supra at 453.

In so ruling, the Court of Appeals noted the Buford decision's requirement that the defendant, as well as his attorney, should be present at any in camera hearing to determine whether a juror is grossly unqualified pursuant to CPL § 270.35.

A somewhat similar situation was also addressed in People v. Torres, supra. In that case, the court refused to delineate the

"greater safeguards" it had referred to in People v. Darby on the ground that a single inquiry as to whether the juror knew the defendant (she did not, but thought that her cousin had a friend who resembled the defendant and shared his surname) did not violate the defendant's right to be present at all material stages of trial. Significantly, in that case an inquiry was actually made of the sworn juror with respect to her extrinsic knowledge of the defendant and, further, such inquiry was made before counsel agreed to consent to her discharge. In the case at bar, however, no such inquiry was made of juror Donovan and counsel's decision to seek discharge of the juror was made before the ineffectual *in camera* meeting between the court and the juror. Consequently, as opposed to the situation in Torres, appellant's counsel did not have even the benefit of the limited, but actual, inquiry into the juror's state of mind which was available to counsel in Torres.

Recognition and protection of appellant's right to be present at all material stages of trial is important in the instant case because had appellant been allowed to be present with counsel during the meeting at which the trial court discharged juror Donovan, appellant would have been able to make his own assessment of Mr. Donovan's demeanor and credibility and would have had the opportunity to ask his attorney to make appropriate inquiries or to at least consult with counsel concerning whether disqualification was really appropriate after having heard from Mr. Donovan regarding the circumstances which caused the controversy. The chance to do so was especially important in this case given that appellant had expressed serious concerns about the first alternate whom he had seen sleeping during the trial.

Appellant submits that this is the appropriate case to recognize a criminal defendant's right to be present at any judicial

inquiry into the gross disqualification of a sworn juror for bias, unfairness or prejudice, or for any purpose recognize by the Sloan /Antommarchi line of cases. Where there is so little functional difference between a defendant's judicially recognized ability to contribute to his own defense by being present during *voir dire* and his similar ability to assist in his own defense at an inquiry into a sworn juror's potential disqualification for bias, unfairness or prejudice, continued differential treatment of the right to be present based upon such insignificant differences amounts to a distinction without real meaning and a capricious denial of constitutional protections at the moment that they are most needed. At the least, this Court should reverse appellant's conviction in light of the trial court's exclusion of even defense counsel from the court's *ex parte* meeting with juror Donovan; the absence of defense counsel denied appellant "the minimum safeguard necessary to afford him a 'fair and just hearing.'" People v. Johnson, 189 A.D.2d 318 (4th Dept. 1993) [where the Fourth Department reversed defendant's conviction because the trial court had conducted *voir dire* and discharged a sworn juror, not only in the defendant's absence, but also in the absence of defense counsel].

Appellant respectfully suggests that this is the appropriate case in which to apply those "greater safeguards" to which the Court of Appeals referred in People v. Torres when it warned that "greater safeguards may be desirable or even eventually held to be required depending upon some future particular fact pattern." People v. Torres, supra at 945. Accordingly, appellant requests that this Court reverse the decision of the Appellate Division, Fourth Judicial Department which affirmed his conviction.

**III. THE APPELLATE DIVISION ERRED IN AFFIRMING APPELLANT'S CONVICTION DESPITE THE TRIAL COURT'S IMPROPER REFUSAL TO RECUSE ITSELF FROM APPELLANT'S CPL § 330.30 HEARING.**

As described more fully in Point III of appellant's principal brief on appeal to the Appellate Division, Fourth Judicial Department, following the verdict, but prior to imposition of sentence, juror Denise Luce hand delivered to the trial court a letter detailing her experience as a juror in appellant's case. That same day, the trial judge met with juror Luce outside the presence of appellant and his attorney. During this 45 minute off-the-record meeting between the court and Ms. Luce, she related to the court her experiences as a juror, including the harassment and extreme pressure she was forced to undergo from other jurors. Ms. Luce discussed several aspects of the case and jury deliberations with the trial court and explained that she did not believe that there was sufficient evidence to convict appellant. She also told the trial judge that two Olean jurors introduced extra record information into the deliberations when they described the lighting in the area of the crime scene and also explained that they could more accurately describe the size and layout of the restaurant than the photographs which were offered into evidence at trial.

When appellant became aware of this *ex parte* meeting between the trial court and juror Luce, appellate counsel requested that the trial judge recuse himself on the ground that he had become a witness to issues disputed in appellant's CPL § 330.30 motion. Appellant stated three grounds as a good faith basis for his request. First, the trial judge had become the sole witness to

juror Luce's statements concerning jury misconduct, an issue which was being litigated as part of appellant's CPL § 330.30 motion. Second, appellant maintained that the trial judge should recuse himself because, in sitting in judgment upon Luce's credibility at the CPL § 330.30 hearing, he had the ability to compare her hearing testimony against the court's own recollection of her statements during the *ex parte* meeting. Consequently, appellant argued that any perceived conflict between her hearing testimony and the statements she made to the trial judge during the *ex parte* meeting could adversely affect the court's opinion as to her credibility and created the risk that the court, whether consciously or subconsciously, could impeach Luce's testimony at the hearing by relying upon what she said in the *ex parte* meeting rather than on her testimony in open court. Finally, appellant asserted that, based upon the court's off-the-record meeting, the trial judge may have already come to a conclusion regarding Luce's veracity with respect to the merits of her claim concerning juror misconduct.

Appellant's concern was that the trial court had become an unsworn witness whose undisclosed recollection potentially or in fact had a substantial impact on the weight which was accorded to juror Luce's hearing testimony. The trial court's refusal to recuse itself left appellant unaware of what extra-judicial information the court may have relied upon in evaluating Luce's testimony. Appellant noted several ways in which the trial court's refusal to recuse itself could negatively impact appellant's prosecution of his CPL § 330.30 claims. In particular, appellant pointed out at least five ways in which the trial court's assessment of juror Luce's testimony could be influenced by information the trial court gained during the *ex parte* meeting with juror Luce, but which information appellant was ignorant of:

(1) the addition of information concerning jury deliberations not previously disclosed by juror Luce during the ex parte meeting with the court;

(2) the omission from her hearing testimony of relevant information previously disclosed by juror Luce to the court during the unrecorded *in camera* meeting;

(3) any court-perceived deviation from her previous description of events in the deliberation room;

(4) any misapprehension by the court as to what juror Luce said during the lengthy meeting with the court; and/or

(5) any court-perceived difference between juror Luce's demeanor during hearing testimony about various events and her demeanor during the court's personal discussions with her about these very issues (i.e., a noticeable change in gravity or ardency concerning particular issues).

Appellant also requested that the court recuse itself in light of two letters sent by the court to appellant's aunt, Ms. Rae Coletti, wherein the court commented specifically on the evidence presented at trial and expressed its opinion as to appellant's potential for success if a retrial were to occur. Further, the trial judge condemned appellant for purportedly blaming the attorneys

who represented him before and during trial rather than accepting responsibility for his own actions and stated that he felt appellant should have accepted the plea bargain which was offered.

Appellant contends that these comments violated § 100.3(6) of the Code of Judicial Conduct and its prohibition that "a judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding." The trial court's comments not only violated this prohibition on *ex parte* communications, but also created an appearance of partiality.

The Appellate Division rejected appellant's challenge in this regard, stating that there was no valid basis for recusal and citing People v. Moreno, 70 N.Y.2d 403 (1987). The Appellate Division did not address the specific grounds asserted by appellant for recusal.

Appellant requests that this Court grant leave to appeal in order to address the serious concerns advanced by appellant with respect to his ability to obtain a fair hearing of his CPL § 330.30 motion. Appellant clearly had a good faith basis for requesting recusal on the basis of the *ex parte* meeting with juror Luce alone. The good faith basis for requesting recusal was further buttressed by the improper communications between the court and Ms. Coletti.

Moreover, appellant's contentions should not be summarily disposed of on the basis of the holding in People v. Moreno, supra. In that case, the defendant requested that the judge who was to preside over his non-jury trial recuse himself

because the judge had been made aware during pretrial proceedings of defendant's prior criminal history and certain photo array evidence which had been suppressed prior to that particular judge being assigned to the case. In affirming the order of the Appellate Division, this Court noted that recusal is not required when a trial judge becomes aware of potentially prejudicial information during the course of the court's performance of its adjudicative responsibilities. People v. Moreno, supra at 407. However, the Court also pointed out that where the prejudicial information stems from an extra judicial source, the better practice may be "for a court to disqualify itself in a special effort to maintain the appearance of impartiality." *Id.* at 406-407.

The significant difference between the case at bar and Moreno is that trial counsel and the defendant in Moreno were fully apprised of the extent of the trial judge's knowledge of potentially prejudicial information. Indeed, the trial attorney was the one who informed the court of the suppressed photo array evidence and, further, both defendant and his attorney were present during the Sandoval hearing at which the court learned of the defendant's prior criminal history. On the other hand, in the case at bar appellant was completely in the dark as to exactly what the trial judge heard during the off-the-record *ex parte* meeting with juror Luce and had no ability to predict the extent to which such extra judicial knowledge would impact the court's evaluation of juror Luce's testimony during the CPL § 330.30 hearing.

The trial court's improper correspondence with Ms. Coletti only exacerbated appellant's concern that the court's exposure to juror Luce during the *ex parte* meeting might influence the court's decision on the CPL § 330.30 motion by demonstrating that the court did not appear to be wholly impartial in its handling

of his case. Consequently, appellant submits that this Court should grant leave to appeal for the purpose of addressing the overriding state-wide concern that justice be not only rendered impartially, but be perceived to have been rendered impartially.

## IV. REVERSAL OF APPELLANT'S CONVICTION IS REQUIRED BECAUSE JUROR MISCONDUCT DURING DELIBERATIONS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL.

Appellant filed a CPL § 330.30 motion alleging, *inter alia*, that jurors injected their own personal knowledge of the crime scene and of the participants in the fight into the deliberations. In particular, jurors Denise Luce and Ruth Painter testified that they had repeatedly argued during deliberations that the testimony as to who was involved in the altercation in the parking lot was insufficient given that the incident occurred at night and that the lack of lighting in the area would have prevented witnesses from specifically identifying appellant. Significantly, there was no testimony offered at trial as to the extent or degree of illumination provided by the lighting in and around the premises of the East Side Pizzeria.

To counter their contentions, two jurors from Olean informed the jury that they were both familiar with the parking lot area and that it was all very well lit at night. Further, in response to the assertion by jurors Luce and Painter that it would have been difficult for Pam Brochu to have heard appellant make a disputed statement from across the restaurant because of the restaurant's size and the numerous patrons engaging in conversations therein, the Olean jurors responded that they had both been to the

restaurant and that it was not as big as the photographs which had been introduced into evidence made it appear.

The two jurors from Olean also interjected into deliberations the fact that the tables inside the restaurant were not arranged in the fashion depicted in the photographs which were marked into evidence. Finally, one of the Olean jurors informed the rest of the jury that she went to church with John Reynolds's sister and that appellant's group, which she called the "Portville Boys," were good boys from good families, well educated, and should have known better than to get into the fight. She also stated that it was going to be difficult to face appellant's family at church.

In rejecting appellant's challenge, the Appellate Division stated merely that "[t]he evidence at the hearing established that the jurors were not subjected to any improper outside influence." In support of its decision, the Appellate Division cited two cases wherein the defendants each failed to present sufficient proof that juror misconduct prejudiced the defendants' substantial rights. See People v. Leonard, 252 A.D.2d 740 (3d Dept. 1998); People v. Gonzales, 228 A.D.2d 722, *lv. denied* 88 N.Y.2d 1021 (3d Dept. 1996).

Appellant submits that the evidence adduced during the hearings on his CPL § 330.30 motion sufficiently established that juror misconduct prejudiced his right to a fair trial. Here, the extra record facts were introduced by the Olean jurors for the expressed purpose of countering arguments relied upon by jurors Luce and Painter, who believed that the evidence was insufficient to sustain a conviction. Additionally, the extra record facts concerned factual issues which went to the heart of the case.

Obviously, the eyewitnesses' ability to identify the participants in the fight was of paramount importance and any information which was interjected into deliberations concerning the sufficiency of the lighting during night time hours played a crucial role in refuting the dissenting jurors' opinions. Additionally, the CPL § 330.30 hearing testimony established that jurors Luce and Painter were concerned about the ability of patrons within the restaurant to hear comments made other customers in various parts of the restaurant, but their concerns were assuaged by the Olean jurors' assurances that, based on their own personal knowledge of the inside of the restaurant, the area was small enough to permit such comments to be overheard.

In essence, these jurors became unsworn witnesses against appellant. The Olean jurors interjected their own knowledge of the restaurant premises and lighting conditions into deliberations in an effort to fill gaps left in the proof by the prosecution. Appellant was obviously unaware that this was occurring and did not have an opportunity to cross examine these unsworn witnesses or to present proof in his case in chief concerning the accuracy of the extra record facts brought into the deliberations by the Olean jurors. Moreover, it is apparent that at least one of the jurors expressed the opinion to the rest of the jury that, based on her personal familiarity with the "Portville Boys", appellant and his acquaintances should be held to a higher standard of conduct given their character and education.

While appellant recognizes that not every verdict may be impeached on these grounds, "whenever, through the introduction of significant extra record facts, a juror becomes an unsworn witness testifying to critical information without defendant being afforded his right to confrontation or cross examination guaranteed

by the Sixth Amendment, the constitutional rights take precedence over New York's policy against impeachment of jury verdicts." People v. Edgerton, 115 A.D.2d 257 (4th Dept. 1985). The fact that the extra record information comes from jurors rather than strangers is of no moment. People v. Edgerton, supra; see also United States ex rel. Owen v. McMann, 435 F.2d 813, 820 (2d Cir.1970), *cert. denied*, 402 U.S. 906 (1971).

Appellant submits that his substantial right to be aware of and to confront witnesses who offered evidence against him was prejudiced by the introduction of extra record facts by jurors during deliberations. Consequently, appellant respectfully requests that this Court grant leave to appeal to address this error.

## V. APPELLANT'S CONVICTION IS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE.

Recognizing that no one could specifically identify appellant as one of Kevin King's attackers, the Appellate Division nevertheless concluded that the proof was sufficient to sustain appellant's conviction. In particular, the Appellate Division found that appellant (1) fit the description of one of the attackers because he had dark hair and wore a dark shirt; (2) appellant was in the proximity of the victim and no one in that vicinity abstained from fighting; and (3) appellant fled upon the arrival of the police, demonstrating his consciousness of guilt. Even if accepted as true, these facts do not allow the drawing of inferences sufficient to establish appellant's guilt beyond a reasonable doubt.

Indeed, the Appellate Division decision fails to mention that the same witness – Pamela Brochu – who gave a description of

one of the individuals involved in the fight as having had dark hair and wearing a dark shirt, specifically testified that she did not see John Reynolds involved in any of the fighting (in fact, she did not see him outside the restaurant at all that night). Moreover, Brochu was adamant that she saw exactly five people attacking Kevin King and identified them each by name. John Reynolds was not one of them.

Further, while appellant may have left the vicinity of the fight after it broke up, he did not "flee" the scene in the traditional sense. As the People brought out in their case-in-chief, appellant was leaving in his truck when the police arrived. He then parked his truck and told Officer Shawn Obergfell what had happened. Appellant then voluntarily appeared at the Olean police station a few hours later to be interviewed concerning the incident. While proof of flight as circumstantial evidence of consciousness of guilt is always of slight value (see, e.g., CJI §9.16), in this case such proof is bereft of even that probative worth.

Accordingly, the circumstantial evidence upon which this conviction is based is weak and the inferences to be drawn therefrom are not sufficiently strong or compelling to warrant a finding of appellant's guilt beyond a reasonable doubt. The inescapable fact is that no one saw John Reynolds kick, strike or punch anyone on October 22, 1994 and there was absolutely no proof that he directed or encouraged anyone else to engage in conduct which he knew created a substantial risk of death to Kevin King. While appellant may have made a comment inside the restaurant in response to remarks made by Steven Hellwig and Kevin Kenyon (notably not in response to anything said by Kevin King) and may have been the first one out the door (according to two of the twelve scene eyewitnesses, one of whom admitted that

appellant said he was leaving simply to talk to Hellwig, his sister's brother-in-law), the inferences to be drawn from those facts, if they are accepted as true, do not establish beyond a reasonable doubt that appellant knew that his conduct created a substantial and unjustifiable risk of death to Kevin King and consciously disregarded that risk or that appellant solicited, requested, importuned or intentionally aided another person to engage in such conduct. Appellant, therefore, respectfully requests that this Court grant leave to appeal from the decision of the Appellate Division, Fourth Department.

## VI. REQUEST FOR STAY OF EXECUTION OF JUDGMENT PENDING DETERMINATION OF LEAVE APPLICATION PURSUANT TO CPL §460.20.

Appellant is presently free on bail pending appeal pursuant to the order of the Honorable John J. Callahan, Justice of the Appellate Division, Fourth Judicial Department. Bail is in the form of a $50,000.00 property bond. During the period of his release on appeal bond, appellant has led a law-abiding life and has remained continuously amenable to the process of the Court. Furthermore, counsel has endeavored to make this application as expeditiously as possible following the entry of the Appellate Division order just eleven days ago. Accordingly, appellant

respectfully requests that the Court of Appeals continue to stay the execution of judgment pending determination of this application for leave to appeal.

Respectfully submitted,

LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA LLP

/s/
Paul J. Cambria, Jr.

PJC/RWW/slw
Enclosures

cc: Honorable Larry M. Himelein
Diane LaVallee, AAG

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

March 15, 2000

Honorable Carmen Beauchamp Ciparick
Judge of the Court of Appeals
The Chanin Building
122 East 42nd Street, Suite 3700
New York, New York 10168-0002

Re: People v. John Reynolds
Cattaraugus Ind. #95-168

Your Honor:

This letter is written in opposition to defendant's February 28, 2000 application for permission to appeal to the Court of Appeals in the above-referenced case. On February 16, 2000, the Appellate Division, Fourth Department, unanimously affirmed defendant's conviction of second-degree manslaughter for his role in the beating death of Kevin King. In his leave application, defendant now raises all but one of the same claims that he advanced in the Appellate Division.[1] Defendant's application should be denied because this Court is either without jurisdiction to review his claims, or review is unwarranted because the Appellate Division correctly applied well-settled principles of law in affirming defendant's conviction.

[1] Defendant does not now ask this Court to review whether his sentence was excessive, a claim that is beyond the power of this Court's review. See People v. Miles, 61 N.Y.2d 635 (1983).

Defendant's first claim, that the trial court erred by failing to define circumstantial evidence, was unpreserved for appellate review, and this Court therefore cannot review it. See generally People v. Liccione, 50 N.Y.2d 850, 851 (1980). At trial, defendant merely requested "a circumstantial evidence charge" (1443), which all parties understood to mean a moral certainty charge.[2] When the court denied that request, defendant never asked the court to read the definition of circumstantial evidence, and he failed to object when the trial court did not include that definition in its charge. See People v. Robinson, 88 N.Y.2d 1001, 1002 (1996). Consequently, the Appellate Division properly held that defendant's claim regarding the failure to define circumstantial evidence was unpreserved. People v. Williams, 250 A.D.2d 429 (1998), *leave denied*, 92 N.Y.2d 908 (1998); People v. Sanchez, __ A.D.2d __, 688 N.Y.S.2d 511 (1st Dep't 1999). Accordingly, defendant's claim regarding the failure to charge circumstantial evidence is not reviewable by this Court. See People v. Nuccie, 57 N.Y.2d 818 (1982).

Applying well-settled law from this Court, the Appellate Division also properly determined that the evidence of defendant's guilt was not entirely circumstantial, and that a "moral certainty" charge was therefore unnecessary. Indeed, the appellate court carefully reviewed the facts in this case in concluding that there was direct evidence of defendant's complicity in the death of the victim, inasmuch as he urged his accomplices to assault the three men, including the deceased. Moreover, the eyewitness testimony established that defendant was part of the group that was kicking

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[2] Defendant's own appellate brief states that this was meant as a request for a moral certainty charge. "At the time the instruction was requested, the court clearly understood that appellant wanted the jury to be instructed on the oral certainty review standard." Defendant's Brief at 35.

and beating the deceased, and that everyone in that group was participating in the beating (Trial record: 1119-20, 1384, 1424-26, 1431). Based on this evidence, and relying on this Court's decision in People v. Roldan, 88 N.Y.2d 826, 827 (1996), the Appellate Division properly affirmed the trial court's finding that this case involved both direct and circumstantial evidence, which alleviated the need for a circumstantial evidence charge. Because this decision merely involves the application of settled law to the particular facts of this case, it presents no issue of broad legal significance that warrants further review in this Court.

Second, defendant's claim that the trial court improperly discharged a sworn juror is patently without merit, and does not warrant this Court's review. This Court has long made clear that a trial court's in chambers questioning of a sworn juror is not a material stage of a trial at which a defendant has a right to be present. See People v. Mullen, 44 N.Y.2d 1, 4-5 (1978). There is no reason to revisit this settled law in this case, especially because defendant was present at the portion of the in camera conference at which the juror's qualifications were discussed and defense counsel demanded the juror's discharge. The only portion of the conference at which defendant was absent was during the purely ministerial action of the trial court in discharging the juror. Under settled law, defendant had no right to be present during that portion of the conference, as his absence could not have had a "substantial effect" on his opportunity to defend. Id.

Nor can this Court review defendant's related claim, that the trial court erred in failing to question the juror before discharging him. As argued below, defendant's claim of an alleged violation of the procedures set forth in C.P.L. §270.35 is not preserved, People v Hopkins, 76 N.Y.2d 872 (1990), and it therefore may not be reviewed by this Court. In any event, after

the defense demanded the juror's discharge, there was no error in the trial court's failure to conduct a detailed inquiry of the juror before discharging him. See People v. Rodriguez, 71 N.Y.2d 214, 220 (1988).

Third, the Appellate Division properly concluded that there was no error of law in the court's refusal to recuse itself from deciding defendant's C.P.L. §330.30 motion. Judiciary Law §14 is the sole statutory authority in New York for the disqualification of a judge. Absent a statutory basis for disqualification, the "judge is the sole arbiter" of whether he should recuse himself. People v. Moreno, 70 N.Y.2d 403, 405 (1987). The decision on this matter cannot be overturned on appeal unless it was an abuse of discretion. Moreno, 70 N.Y.2d at 405-06. That was not claimed in either defendant's appellate brief or in his leave application and, moreover, this type of discretionary decision is generally not reviewable by this Court. Accordingly, there is no issue of law on this point that warrants review by this Court.

Fourth, defendant's claim that there was juror misconduct during deliberations is based upon a mixed question of fact and law that is beyond the power of this Court's review, because the C.P.L. §330.30 hearing record fully supports the court's decision that there was no such misconduct. People v. Scott, 86 N.Y.2d 864 (1995); People v. Burr, 70 N.Y.2d 354 (1987). The allegation that two jurors had introduced their own knowledge of the crime scene was directly refuted by the very jurors who were accused of making the statements in question. The two jurors who alleged the misconduct both contradicted themselves repeatedly on the witness stand, and were, therefore, determined to be incredible by the court. It is clear that where there is a factual dispute or where

credibility is at issue, there is no issue of law involved. Consequently, this Court is without authority to review this issue.

Finally, the Appellate Division properly rejected defendant's claim that the evidence against him was legally insufficient. When viewed in the light most favorable to the People, the evidence was legally sufficient to establish defendant's guilt beyond a reasonable doubt. See Respondent's Brief at 52-57; People v. Contes, 60 N.Y.2d 620 (1983). As the Fourth Department correctly noted, the People were required to prove that defendant, who was charged as a principal and an accomplice, recklessly caused the death of the victim. The testimony showed that defendant urged his friends to fight, was part of the group beating the victim, and fled the scene when the police arrived. Since this issue is merely the application of the particular facts of this case to well-settled law concerning accessorial liability, review by this Court is not warranted.

Accordingly, because this case presents no issues of broad legal significance and presents issues that this Court is without Jurisdiction to entertain, further review of defendant's claims is unwarranted. As a result, the People respectfully request that defendant's leave application be denied.

Respectfully,

/s/
Diane M. LaVallee
Assistant Attorney General
(716) 852-6283

To: Paul J. Cambria, Jr.
Hon. Larry M. Himelein

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pcambria@lipsitzgreen.com

April 6, 2000

Honorable Carmen Beauchamp Ciparick
NYS Court of Appeals
Chanin Building
122 East 42nd Street, Suite 3700
New York, NY 10168-0002

Re: People v. John Reynolds
Cattaraugus County Indictment No. 95-168

Dear Judge Ciparick:

This letter is written in reply to the correspondence of Assistant Attorney General Diane M. LaVallee dated March 15, 2000. That correspondence perhaps best illustrates why the Court of Appeals should review this case.

If for no other reason, leave should be granted so that this Court can correct a misapplication of its holding in People v. Roldan, 88 N.Y.2d 826 (1996), and to ensure that the narrow holding of that decision is not improperly exploited to the detriment of appellant and future criminal defendants. The interpretation of Roldan by the Appellate Division and the People would essentially obviate the need for a moral certainty circumstantial evidence instruction in almost every case should this Court not make clear that Roldan stands on a factually unique foundation.

In Roldan, this Court simply ruled that the *de minimis* inferential analysis involved in observing a gesture and concluding that it is a signal does not render such proof circumstantial evidence. The important distinction which separates Roldan from the instant case was recognized by the First Department in the decision which this Court affirmed. There, the Appellate Division explained that the type of circumstantial evidence in Roldan "must analytically be distinguished from the conclusions a lay eyewitness draws from his observations, and the conclusions a juror is permitted to draw from the eyewitness' continuous narrative." People v. Roldan, 211 A.D.2d 366, 369, 627 N.Y.S.2d 1014, 1016 (1995), aff'd, 88 N.Y.2d 826 (1996). As the First Department correctly explained, the fact that a factual foundation must be laid before the witness can state his conclusion does not make such testimony circumstantial -- e.g., a witness testifying to her observations of a facial expression before describing the person observed as "angry." Thus, the direct eyewitness observations of defendant Roldan gesturing to his accomplice would not constitute circumstantial evidence.

The circumstances in appellant's case, however, are a far cry from Roldan. Here, the jury was asked to consider what appellant meant when he allegedly said, "Are we going to take this shit?" Interpretation of this testimony is no simple two-step process involving minimal and reliable inferential analysis. Rather, the jury here was required to infer appellant's state of mind from a non-directory inquiry made to no specific person. This analysis does not involve the casual, dependable assessment of simple gestures and their meaning in the context of accepted patterns of human behavior. Instead, these Cattaraugus County jurors were asked first to accept that a particular statement was made by appellant and, second, to determine among the conflicting

potential meanings to be drawn from that statement the inference that those twelve people thought to be properly drawn.

Unlike Roldan, the statement relied upon by the Appellate Division as the direct evidence obviating the need for a moral certainty charge was offered for only an interpretive purpose. The function of the jury's analysis was derivative in nature; this was not the simple task of accepting the description of a facial expression as a scowl. This was the challenge of inferring intention from speech. The auditory equivalent of Roldan would be describing a honk as a car horn. The fact that the jury need not engage in the degree of inference drawing required to characterize testimony concerning the car horn as circumstantial does not move analysis of ambiguous language into that realm of fundamentally simple observational evidence.

Notably, the People do not address appellant's contention that the various and disparate inferences to be drawn from the statement attributed to appellant represent the quintessential product of inferential reasoning. Preferring -- for obvious reasons -- to advance a substantively erroneous interpretation of this Court's decision in Roldan, the People conspicuously avoid answering the question of how speech which can be interpreted at least three ways (with at least three correspondingly different implied intentions) can be considered anything but circumstantial evident. The inference to be drawn from "Are we going to take this shit?" is far from self-evident. The evidence monikered "direct" by the Appellate Division is not the hand signal in Roldan or the waving of vehicles in and out of the chop shop in Daddona, expressive conduct fairly susceptible of only one interpretation. People v. Daddona, 181 A.D.2d 688, 581 N.Y.S.2d 356 (2d Dept. 1992), aff'd, 81 N.Y.2d 990, 599 N.Y.S.2d 530 (1993). Rather, the disputed statement -- the only direct evidence found in the case

by the Appellate Division -- requires the exercise of extended deductive powers. Whether the appropriate inference to be drawn from the remark is that appellant was simply responding in kind to the "trash-talking" of Steven Hellwig and Kevin Kenyon or was instead exorting his companions to take up Hellwig's and Kenyon's challenge to fight depends wholly on the jury's view of the context in which those words were spoken. Therefore, it cannot be said that the statement constitutes only direct evidence unless it was offered only for the fact of the words being said, and not their meaning. Since the People have continuously relied upon the meaning they choose to draw from this remark, such evidence can only be treated as circumstantial.

The statement considered as purportedly direct evidence by the Appellate Division and the People must also be judged in relation to what it was offered to prove. The prosecution's burden was to show that appellant was aware of and consciously disregarded a substantial and unjustifiable risk of death to Kevin King or that, possessing such reckless mental state, he solicited, requested, commanded, importuned or intentionally aided another person to engage in such conduct. See, Penal Law §§ 15.05(3), 20.00 and 125.15(1). Judged in relation to the elements to be proven, the mere words purportedly spoken by appellant prove nothing without the aid of inference.

This Court's decision in Roldan has already been misinterpreted by the Appellate Division, Fourth Department. Appellant respectfully submits that the Court should grant leave for the purpose of ensuring that the Roldan decision is not construed more broadly than its narrow factual underpinnings and so that future juries continue to receive proper instructions on how to draw inferences from wholly circumstantial evidence.

On a related note, the People maintain that appellant's contention that the Court also erred in failing to give even a basic definition of circumstantial evidence is unpreserved. While appellant and respondent agree that the challenge to the trial court's refusal to give a moral certainty instruction was unquestionably preserved, respondent maintains that a question of preservation exists because appellant did not explicitly request the basic circumstantial evidence charge when he asked the Court to instruct the jury on the moral certainty standard. Appellant submits that his preserved request for the jury to be instructed as to how they were to draw inferences from circumstantial evidence and how the inferences that they ultimately draw must exclude to a moral certainty all other reasonable hypothesis of innocence necessarily incorporates a charge defining circumstantial evidence. Accordingly, this opportunistic use of the preservation requirement as a shield to prevent review of meritorious appellate claims should be rejected. Moreover, the failure of the trial court to give the jury even a rudimentary understanding of the nature of circumstantial evidence, particularly in a wholly circumstantial case, only magnifies the inadequacy of the Court's final instructions.

Additionally, appellant would note that the cases cited by the People in support of the proposition that appellant's challenge to the trial court's failure to provide even a definition of circumstantial evidence was waived do not address the trial court's failure to provide this most basic jury instruction. Rather, respondent's cited cases deal with the failure of each defendant to request a moral certainty charge. See, People v. Williams, 250 A.D.2d 429 (1998), lv. denied, 92 N.Y.2d 908 (1998); People v. Sanchez, 260 A.D.2d 178, 688 N.Y.S.2d 511 (1st Dept. 1999), lv. denied, 93 N.Y.2d 1026 (1999). In fact, in People v. Sanchez, supra, the defendant acceded to the trial court's decision not to

charge on circumstantial evidence. In the instant case, however, appellant clearly requested that the moral certainty charge with respect to circumstantial evidence be given and appellant submits that such a request necessarily constitutes a request that the jury be instructed on the nature of circumstantial evidence as part of the process of teaching them the proper manner in which they may draw inferences from such evidence.

With respect to the trial court's improper discharge of a sworn juror, appellant submits that the People response fails to recognize the important question presented for resolution by this Court. Characterizing the discharge of a sworn juror on the ground that he is grossly unqualified as a "purely ministerial action" improperly diminishes the important nature of a defendant's fundamental right to be present at all critical stages of trial and presupposes that the inquiries required by this Court in Buford to ensure that sworn jurors are only removed for good cause related to an inability to pronounce judgment impartially were made. People v. Buford, 69 N.Y.2d 290 (1987).

The instant case highlights the conflict between People v. Antommarchi, 80 N.Y.2d 247, 590 N.Y.S.2d 33 (1992), reconsideration denied, 81 N.Y.2d 759 (1992) [where this Court held that defendant Antommarchi had been denied his constitutional and statutory right to be present during questioning concerning "a prospective juror's bias, hostility or predisposition to believe or discredit the testimony of potential witnesses"], and People v. Mullen, 44 N.Y.2d 1, 403 N.Y.S.2d 470 (1978) [where the Court ruled that defendant Mullen did not have a right to be present during *in camera* questioning of a sworn juror for possible disqualification, particularly where defense counsel was present during the questioning of the juror]. Appellant asks this Court to rule simply that the reasoning of the Antommarchi decision

controls where the discharge of the sworn juror relates to that juror's inability to judge the evidence impartially due to bias, hostility or some other factor related to the juror's state of mind. There exists no legitimate reason to have two separate rules regarding a defendant's right to be present during questioning of potential or sworn jurors concerning their ability to judge the evidence impartially where the application of those rules depends solely -- and arbitrarily -- on the mere timing of the inquiry.

This Court's decisions in Buford and People v. Torres, 80 N.Y.2d 944 (1992), reconsideration denied, 81 N.Y.2d 784 (1993), foreshadow the demise of Mullen. While addressing the procedure required to meet the statutory mandate of CPL §270.35, this Court in Buford unambiguously stated that the inquiry into the allegedly unqualified juror's state of mind should be conducted in the presence of the attorneys and the defendant. People v. Buford, supra at 299. While not premised on defendant's fundamental right to be present at all critical stages of trial, the inquiry process mandated by the Buford Court was unequivocally intended to protect and advance a criminal defendant's "constitutional right to a trial by a 'particular jury chosen according to law, in whose selection [the defendant] has had a voice.'" Id. at 297-98, quoting People v. Ivery, 96 A.D.2d 712, 713 (4th Dept. 1983), lv. denied, 60 N.Y.2d 616 (1983). Inasmuch as this Court has seen fit to mandate a defendant's presence during a CPL §270.35 inquiry in order to guarantee his right to trial by a jury in whose selection he has had a voice, the acceptance of the Antommarchi rule with respect to defendant's presence during such inquiries appears only logical.

Moreover, this case is different from Mullen and Torres in a crucial respect: the meeting with the sworn juror was conducted not only in the absence of defendant, but also in the absence of his

attorney. An important distinction drawn by both the Mullen and Torres Courts was that defense counsel's presence during the inquiries in each of those cases was sufficient to protect a defendant's fundamental right to be present at all material stages of trial. Here, however, not only did the trial court fail to make any inquiry into the juror's state of mind before discharging him, but the meeting took place without any thought to even the most minimal protection of defendant's right to be present. Consequently, appellant respectfully submits that this Court should grant leave at least for the purpose of ultimately ruling that a criminal defendant's fundamental constitutional right to be present at all material stages of the proceeding and his constitutional right to a voice in the selection of the jury which tries him require the presence of defense counsel during any conference with a sworn juror concerning that juror's ability to sit as an impartial trier of fact. Further, this is the appropriate case for this Court to finally hold that where the inquiry is into a sworn juror's bias, hostility or other factor related to his ability to sit impartially, only the protections announced by this Court in Antommarchi will suffice and, to that extent, Mullen is an anachronism.

Concerning appellant's contention that the trial court erred in refusing to recuse itself from deciding appellant's CPL §330.30 motion, contrary to respondent's argument, this issue is certainly reviewable by the Court of Appeals. See, People v. Moreno, 70 N.Y.2d 403 (1987). Additionally, an important point not addressed by respondent is the fact that, unlike the defendant in Moreno, appellant did not have the benefit of knowing exactly what the trial judge heard during the off-the-record *ex parte* meeting with the juror and, thus, did not have the ability to assess the extent to which such extra-judicial knowledge would or could impact the Court's evaluation of the juror's testimony during the CPL §330.30 hearing. This distinction is critical. While there

may not be a concern as to the impact of extra-judicial knowledge on a trial judge's decision making process where, as in the Moreno case, both defendant and his attorney are fully aware of exactly what information the trial judge received, where a defendant and his attorney are not privy to such information, the defendant should not be forced to proceed to judgment on a motion to set aside a verdict while ignorant of the extent to which the trial court was exposed to off-the-record information concerning the very question at issue on the motion. Recusal is the better practice in such a situation, especially where an appearance of impropriety is created. People v. Moreno, supra at 406-07.

Finally, contrary to respondent's representations, the proof supporting appellant's conviction was legally insufficient. The People respond with general and conclusory statements such as "defendant urged his friends to fight, was part of the group beating the victim . . ." (see page 3 of March 15, 2000 LaVallee letter), because focusing on the actual facts proven highlights the marked deficiency in the prosecution's evidence. The uncontroverted fact remains that there was no proof that John Reynolds kicked, struck or punched anyone on the night of the incident. Further, while appellant may have made an ambiguous comment while still inside the restaurant and may have been the first one out the door (although only two of the twelve seeing eyewitnesses testified to seeing him leave first and one of those two witnesses admitted that appellant was leaving simply to talk to his sister's brother-in-law), the inferences to be drawn from those facts, if they are accepted as true, do not establish beyond a reasonable doubt that appellant knew that his conduct created a substantial and justifiable risk of death to Kevin King and consciously disregarded that risk or that appellant solicited, requested, importuned or intentionally aided another person to engage in such conduct. Given the dearth of evidence supporting appellant's conviction for manslaughter in the

second degree, appellant respectfully requests that this Court grant leave to appeal.

Respectfully yours,

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PJC/RWW/slw

cc: Diane M. LaVallee, AAG
Honorable Larry M. Himelein